No. 92-311-CFX
Status: GRANTED

Title: Donna E. Shalala, Secretary of Health and Human Services, Petitioner
v.
Richard H. Schaefer

Docketed:
August 17, 1992

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Fuller,Randall J., Davison,Laurie N.

7-16-92 ext til 8-15-92, J. Blackmun - CITED. Ptn due 8-15-92, Saturday; rcd 8-17-92, Monday.

Entry	Date	Note	Proceedings and Orders
1	Jul 6 1992	G	Application (A92-20) to extend the time to file a petition for a writ of certiorari from July 16, 1992 to August 15, 1992, submitted to Justice Blackmun.
2	Jul 16 1992		Application (A92-20) granted by Justice Blackmun extending the time to file until August 15, 1992.
3	Aug 17 1992	G	Petition for writ of certiorari filed.
5	Sep 4 1992		Order extending time to file response to petition until October 16, 1992.
7	Oct 16 1992		Brief of respondent Richard Schaefer in opposition filed.
6	Oct 21 1992		DISTRIBUTED. November 6, 1992
8	Nov 2 1992		Reply brief of petitioner filed.
9	Nov 10 1992		REDISTRIBUTED. November 25, 1992
10	Nov 30 1992		Petition GRANTED.
			**********
11	Dec 22 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
12	Dec 23 1992		Record filed.
		*	Certified proceedings United States District Court for the District of Minnesota.
14	Jan 12 1993	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
13	Jan 14 1993		Brief of petitioner Louis Sullivan, Secretary filed.
19	Feb 16 1993	X	Brief amicus curiae of Natl. Org. of Social Security Claimants' Representatives filed.
22	Feb 16 1993	G	Motion of the Acting Solicitor General to permit William K. Kelley, Esquire, to present oral argument pro hac vice filed.
21	Feb 17 1993		LODGING consisting of four unpublished decisions, ten copies each, received from amici, Legal Services of Northern California, et al.
16	Feb 18 1993		Brief of respondent Richard H. Scaefer filed.
20	Feb 18 1993	X	Brief amici curiae of Legal Services of Northern California, et al. filed.
17	Feb 19 1993		CIRCULATED.
18	Feb 22 1993		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.
15	Mar 3 1993		SET FOR ARGUMENT WEDNESDAY MARCH 31, 1993. (2ND CASE).

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

92-311

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

In this action for judicial review of the denial of a claim for Social Security disability benefits, the district court, in accordance with sentence four of 42 U.S.C. 405(g), reversed the Secretary's decision and remanded for further proceedings. The question presented is:

Whether, in light of *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), the court of appeals correctly held that the district court's remand order was not a "final judgment" that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is Louis W. Sullivan, the Secretary of Health and Human Services. Respondent, the plaintiff below, is Richard H. Schaefer.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is unpublished, but the decision is noted at 960 F.2d 1053 (Table). The prior opinion of the court of appeals in *Welter* v. *Sullivan* (App., *infra*, 3a-8a), on which the court relied in this case, is reported at 941 F.2d 674. The opinions of the district court and reports of the magistrate (App., *infra*, 9a-12a, 13a-25a, 26a-27a, 28a-41a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. On July 16, 1992, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including August 15, 1992 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in relevant part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, * * * may obtain a review of such decision by a civil action * * *. The [district] court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. * * * The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based.

2. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, provides in relevant part:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought * * *. The party shall also allege that the position of the United States was not substantially justified. * * *
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> * * * * *
>
> (2) For purposes of this subsection—
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> * * * * *
>
> (G) "final judgement" means a judgment that is final and not appealable, and includes an order of settlement;
>
> * * * * *

STATEMENT

This case involves the timeliness of an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in an action for judicial review of the denial by the Secretary of Health and Human Services of a claim for Social

Security benefits. Specifically, it presents the question of when the 30-day period for filing an EAJA fee application commences in a case in which the district court reverses the Secretary's decision and remands the cause to the Secretary for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). This Court's decisions in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), have already resolved that question: because such an order is an appealable "final judgment" under 28 U.S.C. 1291, the claimant must file an EAJA application within 30 days of when the time for taking an appeal of the remand order expires. The court of appeals in this case, however, disregarded those rulings. It held that such a remand order is *not* a final judgment, and that respondent's EAJA application—which was filed more than a year later, after proceedings on remand were completed—therefore was timely. Because *Melkonyan* and *Finkelstein* dispose of the question presented, we believe that summary reversal is warranted.

1. Under EAJA, a fee application must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). The term "final judgment" means "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(2)(G).

In *Melkonyan*, 111 S. Ct. at 2163-2165, and *Finkelstein*, 496 U.S. at 624-627, this Court recognized that there are two (and only two) kinds of remand orders in an action for judicial review under 42 U.S.C. 405(g). Sentence four provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

The Court held in *Finkelstein* that such an order is a "final judgment" that is subject to immediate appeal pursuant to 28 U.S.C. 1291, even when it is accompanied by a remand order. 496 U.S. at 625, 629.

A district court also has authority, in limited circumstances, to remand a case to the Secretary pursuant to sentence six of 42 U.S.C. 405(g). Under the first clause of sentence six, the court may (1) remand the case to the Secretary for good cause before he files his answer, or (2) order, at any time, that additional evidence be taken before the Secretary, but only upon a showing that there is new and material evidence and that there is good cause for the failure to incorporate the evidence in the record in the prior proceeding. Because the district court retains jurisdiction during such a remand, the second clause of sentence six requires the Secretary to file with the court any additional or modified findings of fact or decision he renders on remand (along with a supplemental transcript), so that the district court may then render a final judgment in the case. See *Finkelstein*, 496 U.S. at 627-628. This case involves a remand order entered pursuant to sentence four, not sentence six, of 42 U.S.C. 405(g).

2. a. In June 1986, respondent filed an application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* His application was denied at all levels of the administrative appeals process, and he then sought judicial review pursuant to 42 U.S.C. 405(g). By order entered April 5, 1989, the district court "reversed" the Secretary's decision and remanded the case to the Secretary for further consideration in light of the court's order. App., *infra*, 26a-27a; see also *id.* at 28a-41a

(magistrate's recommendation).[1] The Secretary did not appeal that order. The docket sheet indicates that the district court case was then closed.

On remand to the Secretary, in a decision dated January 31, 1990, the ALJ found respondent disabled. That decision became final 60 days later, when the time for review by the Appeals Council expired. App., *infra*, 10a; see 20 C.F.R. 404.984.

b. On July 18, 1990, respondent filed an application in the district court for attorney's fees under EAJA.[2] The Secretary argued that the "final judgment" for purposes of EAJA was the district court's order of April 5, 1989, which reversed the Secretary's decision denying benefits and remanded to the Secretary for further proceedings. That order became final and not appealable on June 4, 1989, upon expiration of the 60-day period allowed by Fed. R. App. P. 4(a)(1) for taking an appeal. Consequently, the Secretary argued, respondent's EAJA application was untimely because it was filed more than a year later, rather than within 30 days, as 28 U.S.C. 2412 (d)(1)(B) requires. The Secretary pointed out that in *Melkonyan*, the Court had stated that in cases remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g), "the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165.

[1] The district court concluded that the administrative law judge (ALJ) failed to evaluate respondent's subjective complaints of pain in accordance with Eighth Circuit precedent, that the ALJ did not properly analyze respondent's back injuries, and that the ALJ's assessment of respondent's residual functional capacity to engage in his past work was not supported by the medical evidence on the record as a whole. App., *infra*, 26a-27a.

[2] The district court's opinion erroneously states that the fee application was filed on July 17, 1990.

The district court rejected the Secretary's argument and held that respondent's fee application was timely. The district court found the timeliness issue in this case to be controlled by the Eighth Circuit's decision in *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991) (reproduced at App., *infra*, 3a-8a), which had been decided only 17 days earlier. *Welter* involved consolidated cases in which the district court had ordered remands to the Secretary pursuant to sentence four of 42 U.S.C. 405(g). After securing benefits on remand, each claimant applied for attorney's fees under EAJA, well in excess of 90 days after the remand orders were entered. Purporting to distinguish this Court's decision in *Melkonyan*, 111 S. Ct. at 2165, the Eighth Circuit held in *Welter* that the district court's orders, though governed by sentence four of 42 U.S.C. 405(g), were not "final 'judgment[s] . . . modifying or reversing the decision[s] of the Secretary'" within the meaning of that sentence. Instead, the court reasoned, "the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits." App., *infra*, 5a. "Because the parties did not report to the district court after the Secretary awarded benefits to the claimants on remand," the court concluded, "no final judgments ha[d] been entered" and the EAJA applications were still timely. *Id.* at 6a.[3]

[3] Although the Eighth Circuit held that the fee applications in *Welter* were timely, it affirmed the district court's finding in each case that the government's position was substantially justified. App., *infra*, 6a-8a. Because the court of appeals'

The district court in the instant case determined that, under *Welter*'s analysis, "no final judgment ha[d] been entered" here as well, and that respondent's fee application therefore was still timely. App., *infra*, 12a. Proceeding to the merits of the application, the district court found that the position of the United States was not substantially justified, and it awarded respondent $1,372.50 in attorney's fees and $120 in costs under EAJA. *Id.* at 9a; see also *id.* at 17a-18a (magistrate's recommendation).[4]

c. The Secretary filed a notice of appeal and requested the court of appeals to consider the appeal en banc because *Welter* constituted binding circuit precedent on the timeliness issue. The court of appeals denied that motion. Thereafter, the panel, considering itself bound by *Welter*, held that respondent's fee application was timely, and it affirmed the district court's judgment in an unpublished per curiam opinion dated April 17, 1992. App., *infra*, 1a-2a.[5]

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judgments therefore were in favor of the Secretary, we did not seek review of the timeliness issue in this Court.

[4] The district court also held that respondent's counsel was entitled under Section 206(b)(1) of the Social Security Act, 42 U.S.C. 406(b)(1), to an award of attorney's fees out of respondent's past-due benefits. See *Bowen* v. *Galbreath*, 485 U.S. 74, 76 (1988). The court awarded counsel $2,287.50 in fees under that provision, subject to counsel's refunding to respondent the amount of fees awarded against the government under EAJA ($1,372.50), as required by Section 3 of the 1985 amendments to EAJA (Pub. L. No. 99-80, 99 Stat. 186, 42 U.S.C. 406(b)(1)). See App., *infra*, 9a; *id.* at 18a-24a (magistrate's recommendation). No question is presented here concerning the award of fees to counsel under 42 U.S.C. 406(b)(1), which was paid by respondent (out of his past-due benefits), not by the government.

[5] The Secretary did not challenge the district court's finding that the government's position was not substantially justified

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision below (and in *Welter*) cannot be reconciled with this Court's decisions in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), and *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990). Those two decisions have clearly resolved the question of when an EAJA application must be filed in a case such as this. The Eighth Circuit's ruling also squarely conflicts with that of the Fifth Circuit in *Luna* v. *Department of HHS*, 948 F.2d 169 (5th Cir. 1991). There, the Fifth Circuit correctly recognized that *Finkelstein* and *Melkonyan* require a claimant to file an EAJA application within 30 days of when a sentence four remand order becomes final and not appealable.

The issue presented by this circuit conflict is of broadly recurring importance in the federal courts, since thousands of Social Security cases are remanded to the Secretary each year. The Tenth Circuit has recently rendered a decision agreeing with the Eighth Circuit in *Welter*, see *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992), and the same issue is pending in four other courts of appeals. Review by this Court therefore is plainly warranted. Because *Melkonyan* and *Finkelstein* dispose of the issue, however, we believe that plenary review is not necessary and that summary reversal would be appropriate.

1. a. In *Melkonyan*, this Court observed that the decision in *Finkelstein* identified two kinds of remands under 42 U.S.C. 405(g): "(1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence." *Melkonyan*, 111 S. Ct. at 2163 (citing *Finkelstein*, 496 U.S. at 624-627). Although in *Finkelstein* the Court "did not state explicitly * * *

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or the amount of the fees, and we likewise do not raise those issues here.

that these were the *only* kinds of remands permitted under the statute," it did so in *Melkonyan*. 111 S. Ct. at 2164. There, the Court held, in light of "Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized," that Congress "intended to limit the district court's authority to enter remand orders to these two types." *Ibid.*

There can be no contention here that the district court's 1989 order was entered pursuant to sentence six of 42 U.S.C. 405(g): the district court neither remanded for good cause on the Secretary's motion prior to filing his answer, nor directed the Secretary to receive new and material evidence based on a finding of good cause for the failure to include such evidence in the record when the matter was pending before the Secretary. Hence, the remand order could only have been entered pursuant to sentence four of 42 U.S.C. 405(g).

Sentence four provides that the district court "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Thus, a remand pursuant to sentence four must accompany (and is ancillary to) a "judgment" affirming, modifying, or reversing the Secretary's decision on the merits. Sentence eight in turn provides that such a judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions" (emphasis added). Based on this explicit statutory text, the Court held in *Finkelstein* that an order entered pursuant to sentence four of 42 U.S.C. 405(g) is a "final judgment" and may be appealed as such pursuant to 28 U.S.C. 1291, even if it is accompanied by an order remanding the cause

to the Secretary for further proceedings. 496 U.S. at 625, 629. The Secretary's decision on remand would then be subject to judicial review in a "separate piece of litigation" pursuant to 42 U.S.C. 405(g). *Finkelstein*, 496 U.S. at 624-625. Under *Finkelstein*, then, the district court's 1989 order was appealable by the Secretary, even though the order (in addition to reversing the Secretary's decision) remanded the cause to the Secretary for further proceedings. Neither the district court nor the court of appeals suggested otherwise.[6]

Under EAJA, a fee application must be filed within 30 days of the "final judgment" in the civil action, which is defined to mean a "judgment" that is "final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). As we have just explained, under sentence

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[6] This Court noted in *Finkelstein* that the order there was unquestionably a "judgment," because "it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue." 496 U.S. at 625. Similarly here, the district court's 1989 order terminated the civil action challenging the Secretary's final decision denying respondent's claim for benefits, "reversed" that decision, and finally decided that the ALJ had not properly evaluated respondent's allegations of pain or his back injuries and that the ALJ's assessment of respondent's ability to perform his past work was not supported by the medical evidence in the record as a whole. App., *infra*, 26a-27a.

It is irrelevant that the district court in this case did not label its 1989 order a "final judgment." "The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a non-appealable interlocutory order as a 'final judgment.' See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976)." *Finkelstein*, 496 U.S. at 628 n.7.

eight of 42 U.S.C. 405(g) and *Finkelstein*, the district court's April 5, 1989, order was a "final" judgment. That order became "not appealable" 60 days later, when the time for taking an appeal expired. Under the plain terms of EAJA, respondent then had 30 more days—until July 4, 1989—within which to file a fee application. The application he eventually filed on July 17, 1990, was more than a year out of time. *Melkonyan* unambiguously confirms this conclusion, for it states that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165.

b. The court of appeals in this case nevertheless held—affirming the district court's EAJA award on the basis of *Welter*—that the district court's 1989 order was *not* a final judgment. App., *infra*, 2a, 12a. Instead, the court reasoned in *Welter* and this case that the district court "retained jurisdiction" for purposes of entering a final judgment after proceedings on remand were completed.[7] Because the parties had not reported to the district court after the Secretary awarded benefits on remand, the court further reasoned that no final judgment had yet been entered and that the fee application filed more than a year later was therefore still timely. App., *infra*, 5a-6a, 12a. This reasoning not only circumvents Congress's decision to impose a 30-day filing requirement under

[7] The remand order in this case, like that in *Welter*, did not expressly purport to retain jurisdiction. See App., *infra*, 27a. See also *Hafner* v. *Sullivan*, No. 91-1634 (8th Cir. Aug. 11, 1992), slip op. 5 (confirming that *Welter* applies even if the sentence four remand order does not "evidence an intent to retain jurisdiction").

EAJA, it also conflicts with the text of 42 U.S.C. 405(g), *Finkelstein*, and *Melkonyan*.

There is no suggestion in 42 U.S.C. 405(g) that a district court may "retain" jurisdiction in a case governed by sentence four for purposes of entering a "final judgment" after completion of proceedings on remand—so as to defeat the appealability of the order that remands the cause to the Secretary (and, as a consequence, to prevent the running of the 30-day EAJA filing period). To the contrary, as the text of 42 U.S.C. 405(g) makes clear (and as *Finkelstein* and *Melkonyan* confirm), a remand under sentence four must accompany a "judgment," and sentence eight deems such a judgment to be "final." 496 U.S. at 625, 629; 111 S. Ct. at 2164, 2165. The district court accordingly has no authority to postpone entry of a "final judgment" when it remands to the Secretary in circumstances such as these. The Court made that very point in *Finkelstein*, explaining (496 U.S. at 629):

> Rather, the fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Nor is there any provision in 42 U.S.C. 405(g) for the Secretary to "report" to the district court following completion of proceedings on a sentence four remand, as the courts below contemplated. App., *infra*, 6a, 12a. In this respect, sentence four stands in marked contrast to sentence six, which expressly

directs the Secretary to file the revised findings and decision he renders on remand (together with a supplemental transcript) with the district court, so that the court may enter a final judgment after reviewing the revised findings and decision, as provided by sentence seven of 42 U.S.C. 405(g).[*] The Court made clear in *Finkelstein* that no such filing requirement is imposed on the Secretary in sentence four cases. 496 U.S. at 625-626.

The Court in *Finkelstein* also specifically rejected the argument (which was essentially adopted by the Eighth Circuit here and in *Welter*) that in a sentence four case, "the district court may enter an appealable final judgment upon reviewing the Secretary's post-remand 'additional or modified findings of fact and decision.'" 496 U.S. at 626 (quoting sentence seven of 42 U.S.C. 405(g)). The Court explained that "[t]he postremand review conducted by the District Court under the seventh sentence refers to cases that were previously remanded under the sixth sentence." 496 U.S. at 626-627.

It was in light of this statutory scheme that the Court held in *Melkonyan* that "[i]n sentence six cases, the [EAJA] filing period does not begin until after postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs." 111 S. Ct. at 2165. By contrast, the Court made clear that in sentence four cases, the filing period begins after the order that includes the remand is entered by the district court and the period for appealing that order

[*] Sentence seven provides that "[s]uch additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision."

has run, with no postponement for completion of the administrative proceedings on remand. *Ibid.* The court of appeals obliterates this carefully drawn distinction between sentence four and sentence six remands.

c. Contrary to the view of the panel in *Welter*, its timeliness ruling was not justified by the fact that "the claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits." App., *infra*, 6a (citing *Sullivan* v. *Hudson*, 490 U.S. 877, 887 (1989)). To be sure, the Court thought it "clear" in *Hudson* that "a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings," and noted that "the vast majority of the Courts of Appeals have come to this conclusion." 490 U.S. at 887; accord, *Finkelstein*, 496 U.S. at 630; see also H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985) (report on 1985 amendments to EAJA) (noting that under EAJA case law, a claimant ordinarily had not been regarded as a prevailing party solely by virtue of obtaining a remand to the Secretary). And even before *Hudson*, this Court had repeatedly held that to be considered a prevailing party, the plaintiff must point to a resolution of the dispute that has changed the legal relationship between himself and the defendant. *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987); see *Hudson*, 490 U.S. at 886-887.

The panel in *Welter* was wrong, however, in believing that, in order to give effect to this established "prevailing party" jurisprudence, it was necessary to hold that a district court remand order under sen-

tence four that contains a remand to the Secretary is not a "final judgment." App., *infra*, 6a. Rather, in sentence four remand cases, the 30-day filing period under EAJA begins to run after the final judgment of remand is entered and the appeal period has run, although a definitive determination of prevailing party status must await completion of the proceedings on remand. As a result, a claimant would be entitled to EAJA fees only if he files a fee application within 30 days after the remand order is no longer appealable, the Secretary awards benefits on remand, and the district court then finds that the government's position was not substantially justified.

Put another way, securing the reversal and remand from the district court is a necessary, but not a sufficient, condition for attaining prevailing party status. That element of prevailing party status must of course be satisfied when the claimant files an EAJA application. The remaining element (an award of benefits)—which is, in essence, a condition subsequent—may be satisfied later. This interpretation of the statutory scheme is both reasonable and practicable: it is fully consistent with both 42 U.S.C. 405(g) and EAJA; and it properly gives effect to both *Melkonyan* and *Finkelstein* on the one hand and the prevailing party jurisprudence endorsed in *Hudson* and *Finkelstein* on the other.

2. For a number of reasons, the Eighth Circuit's decision in this case plainly warrants review by this Court. First, it is flatly inconsistent with this Court's own decisions in *Finkelstein* and *Melkonyan*.

Second, the decisions in this case and *Welter* squarely conflict with *Luna* v. *Department of HHS*, 948 F.2d 169 (5th Cir. 1991). There, the Fifth Circuit held, relying on *Finkelstein* and *Melkonyan*,

that "every fourth-sentence remand order is a 'final judgment' * * * for purposes of the EAJA and section 405(g), and the EAJA's thirty-day time [begins] running at the point at which that final judgment [has] been entered and the period for appeal thereof [has] run." 948 F.2d at 171-172; see also *Frizzell* v. *Sullivan*, 937 F.2d 254, 256-257 (5th Cir. 1991). The Fifth Circuit therefore held in *Luna* that the 30-day filing period began to run upon expiration of the period for appealing the remand order, even though the district court in that case (unlike the district court here) *did* expressly purport to retain jurisdiction during the proceedings on remand and directed the parties to file status reports with the court. See 948 F.2d at 171.[9]

Third, the timeliness issue is of recurring importance. The Tenth Circuit has already rendered a decision agreeing with the Eighth Circuit in *Welter*, see *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992),[10] and cases presenting the same issue are pend-

[9] The Fifth Circuit went on to hold in *Luna* that the 30-day filing period should be equitably tolled in the circumstances of that case, because the district court's remand order purported to retain jurisdiction, "thus unwittingly misleading Luna to think that no final judgment was being entered," and the Secretary had apparently acquiesced in the form of the remand order. 948 F.2d at 173. The Fifth Circuit observed, however, that "[p]rospective claimants, cognizant of *Frizzel* and [*Luna*], presumably could not make the same equitable claim." 948 F.2d at 173 n.5. There is no comparable predicate for an estoppel claim in this case either, even if we assume, *arguendo*, that the 30-day filing period is subject to equitable tolling.

[10] The Solicitor General has authorized the filing of a petition for a writ of certiorari in *Gutierrez*, which is now due on August 26, 1992. See also *Sparling* v. *Sullivan*, 785 F. Supp.

ing in four other circuits.[11] Moreover, because thousands of Social Security cases are remanded to the Secretary each year,[12] it is important to the sound and efficient administration of both the Social Security program and EAJA that there be clear rules for courts and litigants to follow regarding the filing of EAJA applications.

3. The answer to the question presented is supplied by the text of 42 U.S.C. 405(g) and EAJA and by this Court's own decisions in *Finkelstein* and *Melkonyan*. Because that answer is, in our view, quite clear—and because the Court has so recently and thoroughly addressed the operation of 42 U.S.C. 405(g) and EAJA in the context of remand orders—we do not believe that it is necessary for the Court to grant plenary review once again in this case. The Court need only reiterate what it said in *Melkonyan*: "In sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Under that rule, respondent's EAJA application, which was filed more than

312, 316 (N.D.N.Y. 1992); cf. *Scanlon* v. *Sullivan*, No. 91-55516 (9th Cir. July 24, 1992), slip op. 8846-8847.

[11] See *Labrie* v. *Sullivan*, No. 92-1066 (1st Cir.); *Iker* v. *Sullivan*, No. 92-5233 (6th Cir.); *Engelbrite* v. *Secretary of HHS*, No. 91-16920 (9th Cir.); *Newsome* v. *Sullivan*, No. 91-8917 (11th Cir.).

[12] In 1989, the Appeals Council processed 6,432 remands. See Social Security Administration, *Annual Report to the Congress* 29 (Apr. 1990). In 1990, it processed 4,343 remands, Social Security Administration, *Annual Report to the Congress* 34 (May 1991), and in 1991, it processed 2,526, Social Security Administration, *Annual Report to the Congress* 38 (Apr. 1992).

one year after the district court's April 5, 1989, order was no longer appealable, was untimely. The judgment of the court of appeals therefore should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted.

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Solicitor General

STUART M. GERSON
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AUGUST 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3494MN

RICHARD H. SCHAEFER, APPELLEE

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, APPELLANT

Appeal from the United States District Court for the District of Minnesota

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Submitted: April 14, 1992

Filed: April 17, 1992

Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

PER CURIAM.

The Secretary of Health and Human Services appeals the district court's order awarding attorney's

fees to claimant Richard H. Schaefer under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (1988). We affirm.

After the Secretary denied Schaefer's initial application for disability benefits, Schaefer sought judicial review. Finding the Secretary's position was not supported by substantial evidence, the district court remanded the case to the Secretary on April 5, 1989 for further proceedings. On January 31, 1990, the Secretary awarded Schaefer benefits. Neither party returned to the district court until July 18, 1990, when Schaefer filed a motion for entry of judgment and an application for attorney's fees under EAJA. The Secretary argued Schaefer's fee application was untimely under *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991). See 28 U.S.C. § 2412(d)(1)(B) (1988) (fee claimant must file application "within thirty days of final judgment in the action"). Relying on *Welter v. Sullivan*, 941 F.2d 674, 675-76 (8th Cir. 1991), the district court concluded a final judgment had not yet been entered and thus Schaefer's fee application was timely.

On appeal, the Secretary concedes *Welter* controls this case but contends *Welter* was wrongly decided. One panel of this court, however, cannot "disregard a precedent handed down by another panel. Only the [c]ourt en banc can take [this] action." *Drake v. Scott*, 812 F.2d 395, 400 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987). Based on the Secretary's concession that *Welter* controls, we affirm the district court.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 90-2559SI, 90-2725SI, 90-2836SI

EVELYN R. WELTER, APPELLANT

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services of the United States, APPELLEE

LEE D. BOOTON, APPELLANT

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services of the United States, APPELLEE

FRED G. LINT, APPELLANT

v.

LOUIS W. SULLIVAN, Secretary of Health and Human Services of the United States, APPELLEE

Submitted March 13, 1991
Decided Aug. 9, 1991
Rehearing and Rehearing En Banc
Denied Oct. 23, 1991

FAGG, Circuit Judge.

Evelyn R. Welter, Lee D. Booton, and Fred G. Lint (the claimants) appeal separate district court orders denying their applications for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (1988). Because the three appeals present common issues, we decide them in a single opinion. We affirm.

The claimants' applications seeking attorney's fees under EAJA are based on the claimants' successful pursuit of social security disability benefits. Initially, the Secretary of Health and Human Services denied each claimant's application for benefits. Following their losses at the administrative level, the claimants individually sought judicial review in the same district court. The district court concluded the Administrative Law Judges (ALJs) who had reviewed the claimants' applications for benefits either failed to: fully develop the record; include all of the claimants' relevant impairments in the hypothetical questions posed to the vocational experts; explore the possibility of a psychological explanation for some of the claimants' impairments; or properly evaluate the evidence presented. Based on these flaws in the ALJs' methodologies, the district court remanded the cases to the Secretary for further proceedings, without suggesting the Secretary's positions were unreasonable. On

remand, the Secretary awarded benefits to each claimant.

Before we can address the merits of the claimants' appeals, we must decide whether we have subject matter jurisdiction. A party seeking an award of attorney's fees under EAJA must file a fee application "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B) (1988). We lack jurisdiction to consider the merits of fee applications filed beyond this time limit. *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987). The parties agree that sentence four of 42 U.S.C. § 405(g) governs their cases. Thus, the Secretary argues the claimants' appeals are untimely because the claimants filed their fee applications more than ninety days after the district court remanded the claimants' cases to the Secretary for further proceedings. *See Melkonyan v. Sullivan*, —— U.S. ——, 111 S.Ct. 2157, 2165, 115 L.Ed.2d 78 (1991). We disagree.

We think the Secretary misconstrues the district court's orders. Without dictating the claimants should receive benefits, the district court returned the cases to the Secretary for further administrative proceedings because the Secretary committed legal and factual errors in evaluating their claims. In our view, the district court's orders are not final "judgment[s] . . . modifying or reversing the decision[s] of the Secretary." 42 U.S.C. § 405(g) (1988) (sentence four); *see Sullivan v. Hudson*, 490 U.S. 877, 109 S.Ct. 2248, 2255, 104 L.Ed.2d 941 (1989). We believe the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits. *See Hudson*, 109 S.Ct. at 2254-55;

Robertson v. Sullivan, 925 F.2d 1124, 1125-26 (8th Cir.1991); *Taylor v. Heckler*, 778 F.2d 674, 677 n. 2 (11th Cir.1985). This view is supported by the fact the claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits. *Hudson*, 109 S.Ct. at 2254-55. Because the parties did not report to the district court after the Secretary awarded benefits to the claimants, no final judgments have been entered. Nevertheless, the district court ruled on the claimants' fee applications. We see no useful purpose in remanding the claimants' cases to the district court for entry of postremand judgments, and now turn to the merits of the appeals before us. *See Auke Bay Concerned Citizen's Advisory Council v. Marsh*, 779 F.2d 1391, 1393 (9th Cir.1986) (fee applications filed before final judgments are timely).

Under EAJA, courts must award attorney's fees to a prevailing social security claimant unless the Secretary's position in denying benefits was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A) (1988). The Secretary bears the burden of proving the denial of benefits was substantially justified. *Jackson v. Bowen*, 807 F.2d 127, 128 (8th Cir.1986) (per curiam). To establish substantial justification, the Secretary must show the denial had a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565-66, 108 S.Ct. 2541, 2550-51, 101 L.Ed.2d 490 (1988). This means the Secretary's position need only be "justified to a degree that could satisfy a reasonable person" to defeat a claimant's application for attorney's fees. *Id.* at 565, 108 S.Ct. at 2550. We review the district court's decision that the Secretary's position was substantially justified for abuse of discretion. *Id.* at 563, 108 S.Ct. at 2549.

The claimants contend they are entitled to attorney's fees based on the district court's holding that the Secretary's decisions to deny their claims were not supported by substantial evidence. Essentially, the claimants equate the substantial evidence and substantial justification standards, making a fee award automatic when a claimant wins a contested claim for benefits. This contention is misplaced. *Brouwers v. Bowen*, 823 F.2d 273, 275 (8th Cir.1987) (per curiam); *Jackson*, 807 F.2d at 128-29; *see also Pullen v. Bowen*, 820 F.2d 105, 108 (4th Cir.1987).

The district court correctly recognized that "fees are not be awarded just because the Secretary [loses a] case." *Brouwers*, 823 F.2d at 275. The Secretary's position in denying benefits can be substantially justified even if the denial is unsupported by substantial evidence on the record as a whole. *See id.*; *Jackson*, 807 F.2d at 128-29. This is so because the substantial evidence and substantial justification standards are different. *Jackson*, 807 F.2d at 128-29; *Broussard v. Bowen*, 828 F.2d 310, 311-12 (5th Cir.1987); *Pullen*, 820 F.2d at 108; *Federal Election Comm'n v. Rose*, 806 F.2d 1081, 1087 (D.C.Cir.1986); *Couch v. Secretary of Health & Human Servs.*, 749 F.2d 359, 360 (6th Cir.1984) (per curiam). Under the substantial evidence standard, the district court must consider evidence that both supports and detracts from the Secretary's position. *Clarke v. Bowen*, 843 F.2d 271, 272 (8th Cir.1988). In contrast, under the substantial justification standard the district court only considers whether there is a reasonable basis in law and fact for the position taken by the Secretary. *Pierce*, 487 U.S. at 559, 108 S.Ct. at 2547; *Broussard*, 828 F.2d at 312. Because the standards are "neither semantic nor legal equivalents," *Broussard*, 828 F.2d

at 311, the Secretary can lose on the merits of the disability question and win on the application for attorney's fees, *id.* at 312.

Keeping these principles in mind, we turn to the record to determine whether the district court abused its discretion in holding the Secretary's position was substantially justified. If the Secretary was reasonable in denying the claimants' claims for benefits, the Secretary's position was substantially justified and the claimants are not entitled to attorney's fees. Having reviewed the record in each of the claimant's cases, we believe "at least one permissible view of the evidence" shows a reasonable basis in law and fact for the Secretary's position that the claimants were not entitled to benefits. *Jackson*, 807 F.2d at 130. The Secretary relied on opinions of treating physicians, contradictory evidence of pain and limitations, and inconsistent evidence of the claimants' activities to support the denial of benefits in the claimants' cases. Like the district court, we recognize the cases were close. Closeness itself is evidence of substantial justification. *Id.* at 129-30 (citing *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1389 (3d Cir.), *cert. denied*, 474 U.S. 919, 106 S.Ct. 246, 88 L.Ed.2d 255 (1985)). Because the district court did not abuse its discretion in holding the Secretary's position was substantially justified, the district court properly denied the claimant's applications for attorney's fees under EAJA.

Accordingly, we affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. 3-88-71

RICHARD H. SCHAEFER, PLAINTIFF

v.

LOUIS W. SULLIVAN, M.D., Secretary of Health and Human Services, DEFENDANT

[Filed Aug. 26, 1991]

ORDER AND MEMORANDUM

Before the Court are defendant's objections to the May 9, 1991 Report and Recommendation issued by Magistrate Judge J. Earl Cudd.

Based on the file, record and arguments of counsel, IT IS HEREBY ORDERED that plaintiff's counsel is awarded SSA attorney fees of $2,287.50 pursuant to 42 U.S.C. § 106(b)(1) and that plaintiff and his counsel are awarded EAJA attorney fees of $1,372.50 pursuant to 28 U.S.C. § 2412, subject to counsel for plaintiff refunding to plaintiff the lesser of these two fees, $1,372.50.

DATE: August 23, 1991

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

MEMORANDUM

In this Social Security disability case, the Court issued an order on April 4, 1989 stating "that the Secretary's decision denying disability insurance benefits to plaintiff is reversed, that the parties' cross motions for summary judgment are denied, and that the case is remanded to the Secretary for further consideration in light of this Order." On January 31, 1990, an administrative law judge (ALJ) issued a decision in plaintiff's favor which became the final decision 60 days later because it was not reviewed by the Appeals Council. An award certificate was issued on June 12, 1990. Plaintiff filed his petition for attorney's fees on July 17, 1990. The Equal Access to Justice Act, § 2412(d)(1)(B), states that a prevailing party must file for attorney's fees "within thirty days of final judgment in the action." The government argued that the petition should be denied because it was not filed within thirty days of the date on which it became final. The Magistrate Judge recommended that the Court award attorneys' fees pursuant to EAJA. He concluded that a final judgment had not been issued in the case and the petition was therefore timely.

In a recent opinion, *Melkonyan v. Sullivan*, No. 90-5538 (June 10, 1991), the United States Supreme Court clearified what constitutes such a "final judgment" by stating that only the court, not the Secretary or the Appeals Counsel, could enter a final judgment for purposes of EAJA. In his objections to the Report and Recommendation, the Secretary argues that the EAJA fee petition is untimely because the

relevant decision by the court was the remand order of April 4, 1989.[1]

In *Melkonyan*, the Supreme Court considered whether any remand orders by a court could be considered final judgments for purposes of EAJA. It stated:

> we conclude that in Sec. 405(g) actions, remand orders must either accompany a final judgment affirming, modifying or reversing the administrative decision in accordance with sentence four [of 42 U.S.C. § 405(g)], or conform with the requirements outlined by Congress in sentence six. Construing remand orders in this manner harmonizes the remand provisions of Sec. 405(g) with the EAJA requirement that a "final judgment" be entered in the civil action in order to trigger the EAJA filing period. 28 U.S.C. § 2412 (d)(1)B). In sentence four cases, the filing period begins after the final judgment ("affirming, modifying, or reversing") is entered by the court and the appeal period has run, so that the judgment is no longer appealable. *See* Sec. 2412 (c)(2)(G). In sentence six cases, the filing period does not begin until after the postremand proceedings are completed, the Secretary returns to court, and court enters final judgment, and the appeal period runs.

The Secretary characterizes the remand at issue here as a sentence four remand requiring filing by July 3, 1989, 30 days following the end of the appeal period.

Plaintiff argues that since the remand included a denial of *both* parties' motions for summary judg-

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[1] The Secretary does not object to the award of fees pursuant to the Social Security Act.

ment, the April 4, 1989 order was not a final judgment pursuant to sentence four, and that no final judgment had yet been entered by the Court based on the ALJ's award of benefits.

The Eighth Circuit has recently considered similar facts in *Welter v. Sullivan*, Nos. 90-2559SI, 90-2725SI, 90-2836SI, 1991 WL 149701 (August 9, 1991). The panel stated:

> Without dictating the claimants should receive benefits, the district court returned the cases to the Secretary for further administrative proceedings because the Secretary committed legal and factual errors in evaluating their claims. In our view, the district court's orders are not final "judgment[s] . . . modifying or reversing the decision[s] of the Secretary." 42 U.S.C. § 405 (g) (1988) (sentence four); *see Sullivan v. Hudson*, 109 S.Ct. 2248, 2255 (1989). We believe the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits. [citations omitted]. This view is supported by the fact that claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits. *Hudson*, 109 S.Ct. at 2254-55. Because the parties did not report to the district court after the Secretary awarded benefits to the claimants, no final judgments have been entered.

Id. The Court is of the opinion that *Welter* is dispositive of the case before it. Because no final judgment has been entered, plaintiff's petition for attorneys' fees pursuant to EAJA is timely.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil 3-88-71

RICHARD SCHAEFER, PLAINTIFF

v.

LOUIS SULLIVAN, M.D., Secretary of Health and Human Services, DEFENDANT

[Filed May 9, 1991]

REPORT AND RECOMMENDATION

Before the Court are petitions for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and Social Security Act (SSA), 42 U.S.C. § 406. Both petitions request attorney fees for services rendered in Plaintiff's successful appeal to the District Court from the Secretary's denial of Social Security disability benefits. This matter has been referred to the undersigned United States Magistrate Judge for Report and Recommendation in accordance with 28 U.S.C. § 636 and Local Rule 72.1 (c). For the following reasons, the undersigned recommends that counsel for Plaintiffs be awarded

$1,372.50 under the EAJA and $2,287.50 pursuant to 42 U.S.C. § 406(b)(1), along with $120.00 for the filing fee in this case.

BACKGROUND

Plaintiff filed his application for Disability Insurance Benefits (DIB) on June 27, 1986, due to a back impairment, lung surgery and high blood pressure commencing on February 2, 1985. His application was denied initially and upon reconsideration. An administrative hearing was held on April 8, 1987, before Administrative Law Judge (ALJ) Morton J. Goustin. On September 18, 1987, the ALJ issued his decision finding Plaintiff not disabled and, therefore, ineligible for benefits. The Appeals Council denied Plaintiff's request for review and the ALJ's decision became the final decision of the Secretary.

Plaintiff appealed this decision to this Court by filing his complaint on February 9, 1988. *See* Complaint, Docket No. 1. On March 8, 1988, Defendant filed an answer and transcript. *See* Answer, Docket No. 3. On May 9, 1988, Plaintiff filed a motion for summary judgment. *See* Motion, Docket No. 4. Defendant filed a motion for summary judgment on May 9, 1988. *See* Motion, Docket No. 5.

In a Report and Recommendation dated October 19, 1988, the undersigned recommended that the Secretary's decision denying benefits be reversed; that the cross-motions for summary judgment be denied; and that the case be remanded to the Secretary for further consideration. *See* Report, Docket No. 6. On April 5, 1989, United States District Judge Robert G. Renner adopted the undersigned's Report and Recommendation and ordered the same. *See* Order, Docket No. 9.

On July 18, 1990, Plaintiff filed petitions for attorney fees under the EAJA and SSA. *See* Motion, Docket No. 10. Defendant filed an objection to Plaintiff's SSA fee petition with this Court on August 6, 1990. *See* Objection, Docket No. 13. Defendant filed objections to Plaintiff's EAJA petition on August 20, 1990. *See* Objections, Docket No. 14.

DISCUSSION

EAJA Attorney Fees

The EAJA provides in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances makes an award unjust.

28 U.S.C. § 2412(d)(1)(A). It is well established that the EAJA applies to the Social Security Act. *See Cornella v. Schweiker*, 728 F.2d 978, 987 (8th Cir. 1984). Under the EAJA, a prevailing party may be awarded attorney fees only when the position of the United States was not substantially justified. *Id.* at 981; *Cook v. Heckler*, 751 F.2d 240, 241 (8th Cir. 1984). The burden is on the government to prove that its position was substantially justified. *Cornella v. Schweiker*, 728 F.2d at 981-82; *Foley Constr. Co.*

v. United States Army Corps of Eng'r., 716 F.2d 1202, 1204 (8th Cir. 1983) (Citations omitted); *United States for Heydt v. Citizens State Bank*, 668 F.2d 444 (8th Cir. 1982).

Furthermore, a petition under the EAJA must be filed "within thirty days of the final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). Defendant contends that Plaintiff's fee petition was not timely filed as required under the statute and, therefore, this Court lacks jurisdiction to consider the application. Defendant argues that the Appeals Counsel issued a final decision on January 31, 1990, finding Plaintiff disabled. *See Melkonyan v. Heckler*, 895 F.2d 556, 558 (9th Cir. 1990); *Jabaay v. Sullivan*, 920 F.2d 472, 474-75 (7th Cir. 1990). This Court finds, however, that the Appeal Council's final decision is not a final judgment under the EAJA. *See Sullivan v. Hudson*, 109 S. Ct. 2248, 2255 (1989) (Remanding court continues to retain jurisdiction over an action within the meaning of the EAJA, and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary.); *Keasler v. United States*, 766 F.2d 1227, 1229-31 (8th Cir. 1985) (EAJA 30 day period to apply for attorney fees begins to run only upon completion of all appellate proceedings or upon expiration of the time to appeal.). To date, a final judgment has not been entered in this case. Plaintiff's petition for attorney fees under the EAJA is therefore timely and this Court retains jurisdiction to consider the application.

Plaintiff received an Award Certificate from the Social Security Administration dated June 12, 1990. Plaintiff is, therefore, entitled to recover reasonable attorney fees under the EAJA if the government's

position was not substantially justified. *See Cornella v. Schweiker*, 728 F.2d at 981; *Cook v. Heckler*, 751 F.2d at 241. The ALJ failed to apply the *Polaski* criteria to evaluate Plaintiff's complaints of pain. Furthermore, the ALJ's credibility determinations were not supported by substantial evidence on the record as a whole. Finally, the ALJ's finding that Plaintiff was capable of returning to his past work was not supported by substantial evidence on the record as a whole. The Secretary's position, therefore, was not substantially justified. The Eighth Circuit in *Kelly v. Bowen*, 862 F.2d 1333, 1334 (8th Cir. 1988) impliedly found that when the government disregards the established law of the Circuit, there is no substantial justification for such action and an award of attorney fees under the EAJA is appropriate. Plaintiff is, therefore, entitled to recover reasonable attorney fees under the EAJA.

The EAJA provides that:

> . . . the amount of fees awarded under this subsection shall be based upon the prevailing market rates for the kind and quality of services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A). In determining a reasonable fee a court may also consider the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) and adopted in the Eighth Circuit in *Allen v. Amalgamated Transit Union, Local 788*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977). This Court has examined Plaintiff's motion and supporting documents in

which Counsel states that he expended 18.30 hours representing Plaintiff before this Court. This Court finds the total number of hours claimed to be reasonable.

In *Kelly v. Brown*, 862 F.2d 1333, 1336 (8th Cir. 1988), the Eighth Circuit Court of Appeals held that upon proper proof, a court may increase the $75.00 per hour rate for attorney fees authorized by the EAJA to reflect the increase in the cost of living since October 1, 1981. In his petition, Plaintiff's Counsel requests $87.68 per hour for services rendered. Plaintiff, however, has failed to provide sufficient evidence to justify an increase in the fee. Therefore, this Court finds that the proper rate for Counsel's services in this matter would be $75.00 per hour. A reasonable award of attorney fees under the EAJA for 18.30 hours of service would be $1,372.50.

Plaintiff also requests $120.00 in costs for filing fees. *See* 28 U.S.C. § 2412(a). This Court finds Plaintiff's request to be reasonable and concludes such costs should be granted. *See Cotter v. Bowen*, 879 F.2d 359, 361 (8th Cir. 1989).

SSA Attorney Fees

An attorney who successfully represents a Social Security claimant in proceedings before the district court may apply for reasonable attorney fees pursuant to § 406(b)(1), which provides:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

Such an award of fees is discretionary with the court. *See Cotter v. Bowen*, 879 F.2d 359, 361 (8th Cir. 1989). The district court is in the best position to evaluate counsel's services and fee request as the court had the opportunity to observe counsel's representation first-hand. *Id.*

In evaluating an attorney's request for fees in a social security case, the Eighth Circuit in *Cotter* has laid down an expansive three part procedure. First, a court must calculate the lodestar rate. *Cotter v. Bowen*, 879 F.2d at 364. This is done by reference to the twelve factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[1] *Id.* Second, a court must return

[1] The twelve Johnson factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation, and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

to the *Johnson* factors to determine if an upward or downward departure from the lodestar rate is warranted by the particular case. *Id.* Third, a court must balance the § 406 goal of preventing "too great a reduction in a claimant's already inadequate stipend" against the § 406 goal of promoting "adequate representation of potentially disabled individuals through a reasonable attorney's fee." *Cotter v. Bowen*, 879 F.2d at 365. Finally, the Eighth Circuit noted that "Specific findings should be made on the weight being assigned in determining a 'reasonable hourly rate.'" *Id.*

Turning to the lodestar rate, "courts most often turn first to the requesting attorney's own hourly rate in non-contingency fee cases or to the rates charged in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Cotter v. Bowen*, 879 F.2d at 364. Counsel seeks $125 per hour. The rate usually sought and allowed in the community is $125 per hour. *See* Report and Recommendation, *Arriola v. Sullivan*, Civ. No. 4-88-449 (D. Minn. 1990); Report and Recommendation, *Miller v. Bowen*, Civ. No. 4-87-1000 (D. Minn. 1989); *see generally Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989).

An examination of the *Johnson* factors supports a lodestar rate of $125 per hour. Counsel expended 18.30 hours in representing Plaintiff. This Court finds that the time and labor required were not unusual.

This case involved Disability Insurance Benefits. After reviewing the record, this Court finds that this case was neither novel nor exceptionally difficult. Likewise, this case did not require extraordinary skill to perform the legal service properly.

This Court notes that Counsel expended 18.30 hours in representing Plaintiff. Such an expenditure of time would not seem to have a significant preclusive effect on other employment. Any expenditure of time negates the possibility of otherwise utilizing that same time period. The mere possibility that an attorney could have been otherwise occupied does not merit a conclusion that they were precluded from other employment absent specific proof.

Based upon other awards, the customary fee for this type of representation is approximately $125 per hour. *See supra*. Counsel did undertake some risk by operating on a contingent fee basis, being paid out of Plaintiff's past-due benefits. However, the state of the record indicates that the risk was minimal. Plaintiff had a good case and Counsel brought it to a successful conclusion. The case required the skill, competence and diligence of any attorney in a similar situation.

As discussed *supra*, the time involved in Counsel's representation was not preclusive of other employment. There appears to have been no time limitations imposed by the client nor by the circumstances. These factors are accordingly given little weight.

The amount involved was significant. Plaintiff recovered past-due benefits. From Plaintiff's perspective, Counsel obtained excellent results. This Court notes that Counsel's services were effective and obtained a significant recovery for Plaintiff. Counsel is an experienced practitioner. His reputation is a good one and his ability is not questioned.

Compared to other types of cases, all social security cases are undesirable due to the generally limited recoveries and the limit on attorney fees. This Court recognizes this and it forms a substantial element in

this Court's fee analysis. However, when Counsel accepts a social security case he or she does so in full understanding of the nature and limits of the representation. The inherent undesirable elements of social security cases must be recognized but differentiated from social security cases that are undesirable for reasons that transcend the inherent nature of all such cases. Only the latter cases justify consideration as undesirable. This Court finds that this case was not undesirable.

This Court recognizes that Counsel has represented Plaintiff for some time and that such representation has involved substantial litigation. Counsel is to be commended for his efforts on behalf of Plaintiff and this Court accords this factor due weight.

The final *Johnson* factor to be considered concerns awards in similar cases. This Court finds that an award of $2,287.50 is generally consistent with awards in similar cases. *See supra*. In, sum this Court finds that a *Johnson* factor analysis support's a finding of $125 per hour. This Court accordingly finds $125 per hour to be the appropriate lodestar rate.

This Court next considers whether any upward or downward departure from the lodestar rate is justified based upon the *Johnson* factors discussed *supra*. This Court notes that "Plaintiff's counsel bears the burden of showing the reasonable hourly rate thus adopted must be further enhanced to constitute a 'reasonable fee.'" *Cotter v. Bowen*, 879 F.2d at 364 (Citing *Blum v. Stenson*, 465 U.S. 886, 898 (1984). This Court finds that Counsel has not meet [sic] his burden to show that the lodestar should be enhanced and that an analysis of the *Johnson* factors do not justify such a departure.

The time and labor involved in this case were not unusual. The case was not novel, particularly difficult or undesirable. No extraordinary skill was needed and the preclusive effect of accepting the representation was minimal. There were no time limitations imposed upon Counsel beyond those associated with any case and the lodestar rate and awards in similar cases are equivalent with customary norms. *See supra*. These factors shape this Court's decision.

This Court acknowledges Counsel's ability *supra* and that he has undertaken to represent Plaintiff over a substantial period of time with some risk. Counsel has also proven effective in obtaining substantial relief for his client. However, the relatively straightforward nature of this case leads this Court to determine that no enhancement of the lodestar rate is justified. "While the results achieved were very good, . . . this is not the 'rare case' where the results were 'exceptional' and the service rendered surpassed that which would be expected in light of the hourly rate awarded." *Cotter v. Bowen*, 879 F.2d at 364.

Balancing the joint purposes of § 406, does not change this Court's calculus. Counsel will receive a fee comparable to that awarded for similar work and one that should adequately renumerate him for his time and provide an incentive for similar work in the future. At the same time this Court's award will provide Plaintiff with the lion's share of his recovery. *See Gowen v. Bowen*, 855 F.2d 613, 619 (8th Cir. 1988). This Court's award is thus fair and equitable to both parties. This Court finds the lodestar rate to be $125 per hour. As Counsel worked 18.30 hours representing Plaintiff, this Court finds the reasonable compensation due Counsel to be $2,287.50.

Offset of SSA and EAJA Fees

Numerous federal courts have awarded both SSA and EAJA attorney fees in Social Security cases. *See Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir. 1983); *Meyers v. Heckler*, 625 F. Supp. 228 (S.D. Ohio 1985); *Eustache v. Secretary of HHS*, 601 F. Supp. 176 (E.D.N.Y. 1985). To avoid a double recovery of fees by an attorney, courts have generally required counsel to reimburse their clients from the EAJA award "up to the amount awarded under 42 U.S.C. § 406(b)(1) . . . ." *Guthrie v. Schweiker*, 718 F.2d at 108 n.11 (Cited with approval in *Brissette v. Heckler*, 784 F.2d 864, 865 n.1 (8th Cir. 1986)); *see also Eustache v. Secretary of HHS*, 601 F. Supp. at 178. Applying the award of the EAJA fees payable to the Plaintiff's past-due benefits will increase the net benefits received by the Plaintiff. This Court is persuaded that this offset method comports with the purposes of both the EAJA and the SSA.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that based upon the foregoing reasons Plaintiff's counsel be awarded SSA attorney fees of $2,287.50 pursuant to 42 U.S.C. § 406(b)(1); and that Plaintiff and his counsel be awarded EAJA attorney fees of $1,372.50 pursuant to 28 U.S.C. § 2412, subject to counsel for Plaintiff refunding to Plaintiff the lesser of these two fees, $1,372.50.

/s/ Earl Cudd
HON. J. EARL CUDD
United States Magistrate Judge

Dated: May 9, 1991

Pursuant to Local Rule 72.1(c) any party may object to this Report and Recommendation by filing with the Clerk of the Court, and serving all parties within ten (10) days, a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-88-71

RICHARD H. SCHAEFER, PLAINTIFF

v.

OTIS R. BOWEN, M.D., Secretary of Health and Human Services, DEFENDANT

[Filed Apr. 4, 1989]

ORDER

Before the Court are defendant's objections to the Report and Recommendation of United States Magistrate J. Earl Cudd dated October 19, 1988. Magistrate Cudd recommended that the decision of the Administrative Law Judge ("ALJ") denying plaintiff disability insurance benefits under the Social Security Act, 42 U.S.C. secs. 416(i) and 423, be reversed and remanded for reevaluation by the Secretary of Health and Human Services ("Secretary").

The Magistrate concluded that such a remand was necessary for three reasons. First, the Magistrate found that the ALJ failed to evaluate plaintiff's subjective complaints of incapacitating pain in accordance with *Polaski v. Heckler*, 751 F.2d 943, 948 (8th Cir. 1984). Second, the Magistrate found that the ALJ did not properly analyze plaintiff's back injuries. Third, the Magistrate concluded that the ALJ's residual functioning capacity assessment of plaintiff's ability to engage in past relevant work was not supported on the record as a whole by the medical evidence.

After a *de novo* review of the matter, and upon consideration of the memorandum of the parties, and the entire record of the case, the Court hereby adopts the Report and Recommendation of Magistrate J. Earl Cudd dated October 18, 1988. Accordingly, IT IS HEREBY ORDERED that the Secretary's decision denying disability insurance benefits to plaintiff is reversed, that the parties' cross motions for summary judgment are denied, and that the case is remanded to the Secretary for further consideration in light of this Order.

DATED: April 4, 1989.

/s/ Robert G. Renner
ROBERT G. RENNER
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-88-71

RICHARD H. SCHAEFER, PLAINTIFF

v.

OTIS R. BOWEN, Secretary of Health & Human Services, DEFENDANT

[Filed Oct. 19, 1988]

REPORT AND RECOMMENDATION

Plaintiff, Richard H. Schaefer, seeks judicial review of the final decision of the Secretary of Health and Human Services (Secretary) denying his application for disability insurance benefits under the Social Security Act. 42 U.S.C. §§ 416(i) and 423. This Court has jurisdiction to review the Secretary's decision. *Id.* at § 405(g).

On June 27, 1986, plaintiff filed his application alleging disability commencing February 2, 1985, due to a back impairment, lung surgery and high blood pressure. A hearing was held on April 8, 1987, before Administrative Law Judge (ALJ) Morton Goustin

in Minneapolis, Minnesota. The ALJ issued his decision on September 18, 1987, finding plaintiff not disabled, and accordingly ineligible for benefits. The Appeals Council denied plaintiff's request for review and adopted the ALJ's decision as the final decision of the Secretary.

Before the Court are cross-motions for summary judgment. The issue on appeal is whether the Secretary's decision is supported by substantial evidence. After reviewing the record in its entirety, the Court finds the following errors preclude the existence of a record that is fully and fairly developed: plaintiff's subjective complaints of disabling pain were erroneously discredited; plaintiff's back condition was improperly analyzed; and the ALJ's residual functioning capacity (RFC) assessment for plaintiff's ability to engage in past relevant work is not supported by the medical evidence.

It is, therefore, recommended that the Secretary's decision be reversed and the case remanded for further evaluation in accordance with this opinion.

BACKGROUND

The record overall shows plaintiff suffers from chronic degenerative changes of the cervical and lumbar spine; post status cervical fusion at C-5, 6; a prior lung surgery; high blood pressure; and dry eye syndrome.

At the time of the hearing, plaintiff was 57 years old, 5'9" and weighed approximately 190 pounds. (T. 30-1)[1] Plaintiff resided with his wife in Austin, Minnesota. (T. 32) Formal education was completed

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[1] "T." followed by page number denotes reference to the certified transcript of record.

through the eighth grade; however, plaintiff received his G.E.D. (T. 33-4) Plaintiff did not pursue subsequent vocation training or college course work.

Plaintiff has not engaged in substantial gainful activity since February 2, 1985. (T. 17; Finding No. 2) No subsequent work attempts are found. Prior work experience includes employment as an elected business agent for a union and meat cutter. (T. 36-7, 74) The ALJ found plaintiff had a RFC to perform work activities, except those involving prolonged periods of maintaining one position and lifting over 20 pounds. (T. 16; Finding No. 5) Accordingly, plaintiff was found capable of engaging in past relevant work as a business agent. (*Id.*; Finding No. 6)

Physical limitations of plaintiff include lifting no more than 10 to 15 pounds infrequently; the need to alternatively walk, stand and sit; sitting no longer than ¾ hour continuously; limited ability to flex and extend the neck; decreased control of the right hand due to numbness; reading or watching tv no longer than 15 minutes at a time; no crawling, crouching or pushing/pulling. (T. 40, 43, 46, 80, 114, 137-8, 147-8) Disturbed sleeping 3 to 4 nights a week was also reiterated. (T. 46) Plaintiff stated he was unable to work as a business agent because of his inability to sit 80% of the workday and the necessity of doing paper work, which requires a great deal of reading and writing. (T. 43) In order to alleviate back pain, plaintiff lies down everyday in the afternoon for one hour. (T. 41)

Activities engaged in by plaintiff include walking on a daily basis with rests every ½ mile; driving an automobile, light cooking and household maintenance, and socializing. (T. 32, 44, 48-9, 69) Plaintiff and his wife took turns driving to the hearing. (T. 32)

No activities questionnaires were completed by friends or relatives.

The ALJ concluded that the medical evidence established a mild degenerative disease of the cervical and lumbar spine, and dry eyes. (T. 16; Finding No. 3) However, no medically recognized impairment was found. Plaintiff's past medical history includes an anterior cervical spine fusion at the level of C-5, 6 in 1969 after an automobile accident. Treating physician Dr. Paul Arnesen stated plaintiff had no difficulties post operatively until December 1984. (T. 118)

Plaintiff testified that he had injured his back at work when he slipped and fell on ice in the parking lot. (T. 34) This injury occurred on December 27, 1984, and caused immediate pain in plaintiff's back and neck. (T. 108)

Plaintiff's treating physician for his back and neck problems is chiropractor Dr. David Mjoen, who has seen plaintiff on an ongoing basis since December 28, 1984. Dr. Mjoen's notes indicate plaintiff sought medical treatment the day after his fall. (T. 111) Chief complaints included back distress in the bilateral and occipital regions, thoracic distress, paresthesia into the right arm and hand, as well as headaches. *Id.* Improvement was noted on February 4, 1985; however, plaintiff continued to have pain accompanied by headaches 4 times a week. *Id.* In March, left-sided cervical distress was also documented. (T. 110)

On April 26, 1985, plaintiff's diagnosis was an acute moderate traumatic cervical, dorsal and lumbar sprain with muscle spasm, myositis and radiculitis. (T. 106) Plaintiff was seen 3 times weekly at the time; treatment consisted of specific chiropractic adjustments. (T. 106-7) Plaintiff was released to return

to work with restrictions; however, Dr. Mjoen stated, ". . . there is no apparent job that would fit the restriction placed upon him." (T. 106) Activity restrictions included no crawling, reaching above shoulder level, pushing or pulling, carrying or lifting over 50 pounds. (T. 113-4) Dr. Mjoen opined:

> At this point in time his primary problem involves sitting for a great length of time, frerotating [sic] or flexing of the cervical spine which in turn would cause considerable irritation to the injured part of that area. His lifting and carrying should be kept within the above restrictions. I would expect this individual to be able to handle his job within these restrictions however at this point in time it is not advisable to return him to work with no restrictions at all for the simple reason that he is involved in too much heavy lifting and a lot of flexing and rotating of the cervical spine.

(T. 114) Permanent partial disability of 10.5% was concluded by Dr. Mjoen on April 29, 1985. (T. 112)

In May 1985, plaintiff's neck, mid back and low back distress had improved. (T. 117) However, Dr. Mjoen referred plaintiff to Dr. Paul Arneson for an evaluation in September 1985. (T. 115-6) Constant neck and lower back pain were plaintiff's chief complaints. (T. 118) No weakness in the upper extremities was found; minimal hyposthesia over the fourth and fifth fingers was noted; sensation in lower extremities was normal. (T. 120-2) An AP and lateral view of the dorsal spine revealed a straight dorsal spine and moderate hypertrophic degenerative changes

at all levels. (T. 123) Additionally, significant degenerative changes were found in the facet at L-5, S-1 on the left side, while minimal changes were noted on the right. *Id.* Dr. Arnesen's final diagnosis was solid bony fusion C5, 6; cervical disc syndrome; low back strain; and myositis of the trapezius muscle on the right. (T. 124) Recommended treatment included cervical traction, muscle relaxants, local heat and analgesics. *Id.*

Plaintiff was hospitalized from October 4, 1985, until October 9, 1985, for evaluation of his cervical disc syndrome. (T. 125) Chest x-rays showed the heart and great vessels to be normal, and the pulmonary parenohyma was unremarkable. (T. 126) Significant relief was obtained through physical therapy. (T. 125)

A cervical CT scan in November 1985 demonstrated mild degenerative narrowing of the C-4, 5 disc space; no other significant abnormalities were noted. (T. 130, 133, 135) In December 1985, Dr. Arneson's diagnosis included radiculitis, cervical right accompanied by instability of the cervical spine above the level of the fusion. (T. 133) Evidence of nerve root irritation and compression was present at level C-6, 7. (T. 134) Dr. Arneson opined, ". . . he is not capable of carrying out any type of effective work at the present time." (T. 133) A possible extension of plaintiff's existing fusion was suggested; however, plaintiff did not want surgical intervention at this time. (T. 134)

On January 31, 1986, Dr. Mjoen again reiterated that plaintiff could return to work with the previously mentioned restrictions. (T. 136) A poor prognosis for complete recovery was provided along with the following diagnosis:

1. Chronic recurrent cervical radiculitis complicated by recurrent fixations at the level of C-4, C-5, C-6 and C-7;

2. Chronic recurrent dorsal-lumbar sprain with associated radiculitis complicated by recurrent spinal fixations at the level of T-12, L-1, L-2, L-5, S-1.

Id. Furthermore, Dr. Mjoen concluded:

> I do feel that he should be able to improve from what he is now, however *I do not feel that he will ever be able to return to full time unrestricted work or the type of work that he has been doing in the past.* (emphasis added)

(T. 136) A functional capacities evaluation completed by Dr. Mjoen contained various restrictions such as no prolonged sitting; no bending, lifting or twisting of the dorso-lumbar spine; no continual rotation of the head up and down or from side to side; lifting and carrying no more than 35 pounds on an occasional basis. (T. 137-8)

The need for continual chiropractic treatment in order to avoid symptomatology was deemed paramount by Dr. Mjoen in May 1986. (T. 138) X-rays taken in August 1986 revealed moderate disc degeneration between C-4, 5, which restricted flexion and extension in both directions; a left convex lumbar curvature with narrowing of the disc spaces at level T-12, L-1 and L-1, 2; mild anterior spurring on bodies of L-1, 2, 3; and slight retrolesthesis of L-5, S-1. (T. 140)

Consulting orthopedic surgeon Dr. A. Lilly examined plaintiff on August 22, 1986. (T. 144-5) Plaintiff appeared anxious to procure some form of sedentary work. (T. 145) A poor prognosis for significant

future improvement was given due to the chronic degenerative changes in the cervical and lumbar spine. *Id.*

Dr. P. Gislason examined plaintiff in September 1986 on behalf of the Home Insurance Company. (T. 146-7) Plaintiff demonstrated good range of motion of the upper extremities and cervical motion was limited to 50% of normal. Again, it was surmised that plaintiff had reached maximum medical improvement. (T. 147) Further, plaintiff's pre-existing 1965 impairment was seen as an aggravating factor in his present condition. *Id.*

Dr. Allan Hagen saw plaintiff in the early part of 1987 for recurrent burning and soreness in both eyes. (T. 180) Reading, driving and watching TV continued to bother plaintiff. (T. 181-2) Dr. Hagen attempted to place silicone plugs in plaintiff's tear drain system; however, the problem was not alleviated. *Id.* An impression for dry eye syndrome was provided.

Dr. David Dines of the Mayo Clinic provided information concerning plaintiff's operation for wedge resection of the granuloma, which involved a thoracotomy that was performed by Dr. W. Payne on June 6, 1977. (T. 94) Plaintiff recovered well and no evidence of malignancy was noted. (T. 96) Pulmonary testing in September 1978 evidenced obstructive airways disease. (T. 104)

Vocational evaluations were completed by Dr. Frank Lamp in April 1987. (T. 166-79) Plaintiff's past history for high blood pressure was noted, but it appears to currently be controlled with medication. (T. 166) It is also significant to note that plaintiff had previously worked with the Karr Rehabilitation Services for three 90 day periods. *Id.* No appropriate jobs were found; placement potential was described

as "extremely poor." (T. 173) Plaintiff's verbal aptitude and intelligence was in the highest third exclusive of the top 10% of the population. (T. 172) Dr. Lamp concluded:

> Mr. Schafer is unable to function in any position related to a business agent for a union . . . He is of advanced age (age 57) which makes it extremely difficult to utilize the skills he has attained to transfer to a new vocational area.
>
> * * *
>
> It is therefore, my professional opinion . . . that Mr. Schaefer is not employable at this time, nor will he reach a level of becoming employable.

(T. 175)

RFC assessments were provided by nonexamining consulting physicians Alan Suddard, James Henry and Randall Norgard. (T. 88-94, 148-9) Dr. Suddard concluded ability to engage in past relevant work as a business agent; while Dr. Henry concluded an RFC for medium work modified for neck rotation and extension. (T. 89, 92) Dr. Norgard also found plaintiff capable of medium work with the before mentioned modification, as well as the physical ability to frequently climb, crouch, crawl, kneel and stoop; to sit for 6 hours during an 8 hour day; and unlimited pushing and pulling. (T. 148)

DISCUSSION

The ALJ's factual findings are conclusive if supported by substantial evidence on the record as a whole. *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987). The Court distinguishes between mere substantial evidence and substantial evidence on the

record as a whole. *Id.* A more scrutinizing analysis is invoked by the latter. *Smith v. Heckler*, 735 F.2d 312, 315 (8th Cir. 1984). In reviewing an administrative decision, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951) (Frankfurter, J.); *see also Brand v. Secretary*, 623 F.2d 523, 527 (8th Cir. 1980). Accordingly, the Court must apply a balancing test to evidence that is contradictory.

A number of errors transpired at the administrative level in the instant case. First, plaintiff's subjective complaints of incapacitating pain were improperly discredited. The ALJ did not evaluate plaintiff's complaints in accordance with *Polaski v. Heckler*, 751 F.2d 943, 948 (8th Cir. 1984). Although plaintiffs' medication, various activities and physical limitations were addressed; the ALJ failed to consider aggravating circumstances such as a preexisting back condition and spinal fusion; the opinions of treating physicians; and the duration, frequency and intensity of plaintiff's pain. The ALJ is entitled to discredit plaintiff based on inconsistencies found in the record; however, the opinions of treating physicians which are supported by medical evidence cannot be ignored. *Carpenter v. Heckler*, 733 F.2d 591, 593 (8th Cir. 1984). Medical notes consistently state constant neck and back pain due to degenerative changes.

Plaintiff's ability to do certain types of activities does not preclude a finding of disability. *See e.g., Nettles v. Schweiker*, 714 F.2d 833 (8th Cir. 1983) (short walks, watching TV and driving a car are not inconsistent with severe pain); *Klug v. Weinberger*, 514 F.2d 423 (8th Cir. 1975) (driving, walking

short distances, carrying packages and socializing are not evidence that plaintiff can work). Therefore, the mere fact that plaintiff walks 7 days a week, drives an automobile and socializes is insufficient to discredit plaintiff.

Recognized or acceptable medical evidence includes evidence from other practitioners, which expressly includes chiropracters. *See* 20 C.F.R. § 404.1513(e)(3) (1988). The ALJ states that claimant did not consult a medical doctor until several months after his fall. (T. 12) Plaintiff saw chiropractor Dr. Mjoen on December 28, 1984, or the day after he had fallen on the ice. (T. 111) Moreover, plaintiff continued to see Dr. Mjoen 3 times a week for several months. (T. 106) Dr. Mjoen eventually referred plaintiff to orthopedic surgeon Dr. Paul Arneson in September 1985 for consultation. (T. 115) As Dr. Arneson pointed out, plaintiff's condition may eventually necessitate surgical intervention should patient experience intractable pain that cannot be tolerated. (T. 134) Therefore, on remand the ALJ should consider more closely plaintiff's chiropractic treatment immediately after his accident.

Second, plaintiff's back pain was not given an individualized evaluation.

> A back condition may affect one individual in an inconsequential way, whereas the same condition may severely disable another person who has a greater sensitivity to pain or whose physical condition due to age, obesity, deformity, or general physical well-being is generally deteriorated.

Simonson v. Schweiker, 699 F.2d 426, 429 (8th Cir. 1983) (citations omitted). Plaintiff's advanced age coupled with his weight and moderate hypertrophic

degerative changes at all levels, (T. 123, 143-5), warranted a different analysis. Additionally, plaintiff testified that he needs to lie down everyday in the afternoon for one hour to alleviate his back pain. (T. 41)

Third, the ALJ's finding that plaintiff possessed the requisite RFC to engage in past relevant work as a union business agent is not supported by substantial evidence. *See Vahr v. Heckler*, 741 F.2d 177, 179 (8th Cir. 1984) (Secretary must establish through medical evidence a claimant's RFC). Treating physician Dr. Mjoen expressly opined, ". . . I do not feel that he will ever be able to return to full time unrestricted work or the type of work he has been doing in the past." (T. 136) Dr. Arneson also found plaintiff not capable of carrying out any type of effective work. (T. 133) Moreover, the functional restrictions imposed by Dr. Mjoen do not permit plaintiff to engage in sedentary work which would require extensive forward flexion of the neck as well as periods of prolonged sitting. Further, plaintiff's dry eye syndrome prevents him from performing work that requires extensive reading and writing. The opinions provided by nonexamining consulting physicians Suddard, Henry and Norgard do not provide sufficient evidence in support of the ALJ's RFC assessment. *See Turpin v. Bowen*, 813 F.2d 165, 171 (8th Cir. 1987) (the opinions of consulting physicians cannot constitute substantial evidence when contradicted by those of treating physicians).

Further, since pain was clearly at issue, plaintiff's ability to work should have been determined with the assistance of a vocational expert. *McCoy v. Schweiker*, 683 F.2d 1138, 1148 (8th Cir. 1982). The Secretary has failed to prove that there are jobs in the national

economy that realistically suit plaintiff's actual capabilities. *See e.g., Lewis v. Heckler*, 888 F.2d 1293 (8th Cir. 1987); *O'Leary v. Schweiker*, 710 F.2d 1384, 1342 (8th Cir. 1983) (plaintiff should be able to perform the necessary acts of a workday as found in the competitive conditions of the real world of work).

Finally, plaintiff's age, education and work experience become relevant in determining plaintiff's RFC. *See* 20 C.F.R. §§ 404.1560, 404.1563 and 404.1564. Plaintiff is a person of advanced age, with marginal education. *Id.* Of significance is the following:

> We consider that advanced age (55 or over) is the point where age *significantly affects* a person's ability to do substantial gainful activity. If you are severely impaired and of advanced age and you cannot do medium work . . . you may not be able to do work unless you have skills that can be used in (transferred to) less demanding jobs which exist in significant members in the national economy. (Emphasis Added)

Id. at § 404.1563(d). The definition for medium work includes lifting up to 50 pounds with frequent lifting or carrying of objects weighing up to 25 pounds. 20 C.F.R. § 404.1567(c). Since plaintiff's physical limitations do not permit medium work, plaintiff's advanced age does become relevant. Moreover, Dr. Lamp's vocational evaluations evidence no transferable skills from plaintiff's past employment, as well as plaintiff's extremely poor potential to seek employment. *See* (T. 166-79).

RECOMMENDATION

Based on the foregoing, IT IS RECOMMENDED THAT the Secretary's decision denying disability insurance benefits to plaintiff be REVERSED; that the cross-motions for summary judgment be DENIED; and the case be REMANDED to the Secretary for further consideration.

Dated: Oct. 19, 1988

/s J. Earl Cudd
J. EARL CUDD
United States Magistrate

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Supreme Court, U.S.
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(2)

No. 92-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the court of appeals below correct in holding that respondent's fee application under the Equal Access to Justice Act was timely, where the district court had remanded the case to the agency for further proceedings, resulting in an award of disability benefits to respondent, and respondent's fee application was filed prior to the district court's issuance of a post-remand judgment?

2. If not, should this Court's ruling be given prospective effect only because when respondent filed his fee application it was timely under all then-existing precedent and all of the agency's pronouncements on the subject?

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In The

Supreme Court of the United States

October Term, 1992

No. 92-311

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITON

Statement of the Case

In June 1986, respondent Richard H. Schaefer filed an application for social security disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, which was denied at the administrative level by petitioner Secretary of Health and Human Services (the "Secretary"). Respondent then sought review under 42 U.S.C. § 405(g) in the United States District Court for the District of Minnesota which, on April 5, 1989, reversed the Secretary's decision on various legal grounds, denied both

parties' motions for summary judgment, and remanded for further administrative proceedings (Pet. App. 27a). The court did not at that time enter a separate judgment pursuant to Federal Rule of Civil Procedure 58.

Thereafter, pursuant to the district court's ruling, the Secretary considered the case anew, and, on January 31, 1990, an administrative law judge ("ALJ") determined that respondent was disabled (Pet. App. 10a). When the Secretary's Appeals Council did not review that determination within the time allowed by law (*id.*), *see* 20 C.F.R. §§ 404.983, .984, the Secretary issued an award certificate to respondent (Pet. App. 10a). Shortly thereafter, respondent moved for entry of a final judgment in the district court and filed an EAJA application for an award of attorney's fees for 18.3 hours spent securing respondent's entitlement to benefits (*id.*).

The procedural history of the fee dispute described in the Petition (at 6-8) is largely accurate, and we will not repeat it. The district court (Pet. App. 9a), affirming the magistrate's recommendation (Pet. App. 15a-18a), held that respondent was entitled to an award of attorney's fees under the EAJA because the Secretary's position in the litigation was not "substantially justified," *see* 28 U.S.C. § 2412(d)(1)(A), a finding that the Secretary did not challenge in the court of appeals. Both the district court and the court of appeals rejected the Secretary's claim advanced here that respondent's application was untimely for the reasons set forth in the Petition.

Two facts omitted from the Petition are noteworthy. First, respondent's decision to seek fees only after the administrative proceedings on remand had been completed was fully consistent with, *indeed demanded by*, applicable law. *See, e.g., Swedberg v. Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *accord Sullivan v. Hudson*, 490 U.S. 877, 887 (1989). Moreover, the Secretary himself, through regulations and in litigation, had specifically endorsed that

approach. *See Brown v. Sec'y of HHS*, 747 F.2d 878, 887 (3rd Cir. 1984); 54 Fed. Reg. 37,789, 37,791 (1989).

Second, it is *respondent's* money, not his lawyer's, that is at stake here. The district court, as required by law, specifically ordered respondent's attorney to refund the EAJA fee to respondent, allowing the attorney to retain only a contingent fee from respondent's back benefits (Pet. App. 9a). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note)(requiring refund of smaller award to claimant). Thus, a reversal here would diminish respondent's disability recovery, even though the Secretary's position on the merits was unreasonable.

The issue in this case is whether, in a social security disability case remanded for further administrative proceedings under the fourth sentence of 42 U.S.C. § 405(g), a claimant may file an application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), after a favorable conclusion of the remand proceedings, as the court of appeals held, or, as the Secretary argues, whether every claimant who obtains a sentence-four remand must file a fee application shortly after remand, before the claimant even knows if he or she has prevailed.

As we explain in Part A below, although one court of appeals disagrees with the approach taken below, the split is not sufficiently important to warrant this Court's time and resources, especially because the issue does not affect the substantive rights of social security claimants or their attorneys, nor does it bear on any policies Congress sought to advance in enacting the EAJA. Moreover, if the issue needs resolution, Congress, rather than this Court, is the preferable forum in which to resolve it.

Ordinarily, we would respond to the Petition simply by explaining why review should be denied. But this is not the usual case. The Solicitor General has not only asked for a writ of certiorari, but for summary reversal, despite

the extreme complexity of the issues presented and the fact that the Secretary's position is at odds with virtually all of the decisions of the lower courts. *See Labrie v. Sec'y of HHS*, No. 92-1066, slip op. at 12-15 (1st Cir. Sept. 30, 1992)(discussing cases). However, because of the government's request, we are constrained to explain in Part B why the Secretary's position on the merits is incorrect and why, even if it were correct, the ruling should not be applied retroactively. At the very least, that discussion makes clear that the issues here are ill-suited for summary disposition.

A. This Court Should Deny Review.

Respondent concedes that there is a split in the circuits. The court below, following its previous decision in *Welter v. Sullivan*, 941 F.2d 674 (8th Cir. 1991), held that the district court may, after remanding a case pursuant to sentence four of 42 U.S.C. § 405(g), hold its judgment in abeyance until after the administrative remand proceedings are completed, at which time the claimant, *if* he or she has prevailed, may file an EAJA fee application (Pet. App. 1a-2a). *Accord Labrie*, *supra*; *Gutierrez v. Sullivan*, 953 F.2d 579 (10th Cir. 1992), *cert. pending*, No. 92-361. The Fifth Circuit, on the other hand, has held that the EAJA's statute of limitations is triggered immediately by a sentence-four remand. *Luna v. Dep't of HHS*, 948 F.2d 169 (1991). These cases all purport to apply this Court's recent decision in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), and its predecessor decisions, *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), and *Sullivan v. Hudson*, 490 U.S. 877 (1989). As we now explain, despite this split in authority, there is no reason for this Court to grant review in this case.

1. This Court's decision in *Melkonyan* was issued only a little more than a year ago and because of the nature of the circuit split, there is no reason for this Court to enter the fray so soon thereafter. The fact that there are

different rules currently in place in the Eighth and Fifth Circuits is completely tolerable and, despite petitioner's conclusory assertion to the contrary (Pet. 18), will have no lasting impact on petitioner's administration of either the Social Security Act or the EAJA.

Because fee litigation occurs after the merits of a dispute have been adjudicated or otherwise resolved, it does not directly affect the primary behavior either of the litigants before the court or of other people whose substantive conduct Congress wishes to influence. To be sure, some fee decisions may have an impact on the ability of litigants to hire attorneys, either by making it easier or harder to obtain a reasonable fee.

Here, however, the only question is the *timing* of the fee application, not the *availability* of fees. The EAJA's beneficent purposes are simply unaffected by differing rules governing the EAJA's limitations period. Thus, while the lower courts have taken various approaches to this Court's decision in *Melkonyan*, as it applies to sentence-four cases, once that litigation has played itself out, there will be no confusion for claimants and their lawyers as long as they follow the law in the circuit in which they have filed. For instance, after the Fifth Circuit's decision in *Luna*, *supra*, claimants who obtain sentence-four remands know to file their fee applications within the next 90 days. If they fail to do so, it is *they*, not the Secretary, who will suffer the consequences, just like any other litigant who fails to follow procedural rules or precedents. *See Luna*, 948 F.2d at 173 n.5.

While we agree with the Secretary that he operates a very large adjudicatory system, in which there are many remanded cases each year (*see* Pet. 18), that fact has nothing to do with whether the split in the circuits creates problems for him. Differing statutes of limitations present no burden on the Secretary because the statute does not run against him. Social Security practitioners, on the

other hand, generally practice in one locality, and almost always within one circuit, and should have no problem understanding the applicable rule once it is established.

There are well over 100 federal fee-shifting statutes, *see Marek v. Chesny*, 473 U.S. 1 (1986)(appendix to opinion of Brennan, J., dissenting), and, to our knowledge, only the EAJA and a tax statute patterned on the EAJA, 26 U.S.C. § 7430, have statutes of limitations. With respect to the dozens of fee provisions that do not contain statutes of limitations, a myriad of local rules apply, many of which contain filing deadlines.[1] The circuit split presented here is far less difficult to navigate for litigants and their attorneys than are the requirements for other fee applications, given the variation among local practice rules. But the answer to the "problem" in both situations is the same: unless and until Congress acts to provide uniformity, lawyers will consult the appropriate rule and file their fee applications accordingly. Meanwhile, given the priority that ought to be given to matters of substantive concern, there is no pressing need for this Court to attempt to impose a nationwide EAJA filing deadline in a subcategory of cases remanded to the agency for further proceedings under the Social Security Act.

2. Even if the split in the circuits was as intolerable as the Secretary suggests, there is a second reason why this Court should decline to hear this case. The resolution of the question presented is not the simple one-issue case that the Secretary's one-paragraph request for summary reversal suggests (Pet. 18-19). We completely disagree with the Secretary's conclusion as to when a fee application should be filed and resolved in a sentence-four case, and, as we show in Part B below, a careful review of the statute's relevant language shows that the Eighth Circuit's decision was correct.

[1] *See, e.g.*, Fed. Cir. R. 47.9(a)(10 days after judgment); 9th Cir. R. 39-1.6 (30 days after judgment, except where party has asked for rehearing, in which case, 14 days after denial of rehearing); 8th Cir. R. 47C (14 days after judgment); S.D. Ohio L.R. 54.2 (30 days after judgment); D.D.C. Rule 215 (no filing deadline, but status conference ordinarily within 60 days of judgment); E.D. and W.D. Ark. R. 27(a)(14 days after judgment).

But if this Court *were* to grant review, it would have to deal comprehensively with the difficulties engendered by this Court's decisions in *Finkelstein* and *Hudson*, as well as *Melkonyan*. Thus, the Court would need to determine not only when a sentence-four fee application should be filed, but whether a claimant is a prevailing party entitled to fees by virtue of obtaining a sentence-four remand alone. That issue has divided the lower courts, but, unlike the issue discussed above, it presents a serious substantive question for this Court to resolve.[2] The Court will also need to determine whether the rule in *Hudson* — that work done in post-remand administrative proceedings are compensable under the EAJA — applies in sentence-four cases. Although we strongly believe that it does (particularly because *Hudson* itself was a sentence-four case), the courts have disagreed on that issue.[3]

In addition, there are questions as to what is meant by a "final" judgment under the EAJA, which have continued to plague the courts. In particular, the courts have come to different conclusions about when the 30-day filing period begins to run when the government purports to

[2] *Compare, e.g., Spurlock v. Sullivan*, 783 F. Supp. 474, 479 (N.D. Cal.)(claimant prevails and is eligible for fees by virtue of winning remand), *reaffirmed*, 790 F. Supp. 979, 980 (N.D. Cal. 1992), *with Van Tassel v. Sullivan*, 789 F. Supp. 1108, 1108-09 (D. Colo. 1992)(fee application filed after remand order premature; must wait to file until after plaintiff prevails on remand).

[3] *Compare, e.g., Spurlock*, 783 F. Supp. at 479 (*Hudson* fees not available in sentence-four cases), *with Heredia v. Sec'y of HHS*, 783 F. Supp. 1550, 1558 (D. Puerto Rico 1992)(*Hudson* fees available in sentence-four cases); *Linkins v. Sullivan*, 779 F. Supp. 1324, 1327 (M.D. Fla. 1991)(same). *See generally Labrie v. Sec'y of HHS*, No. 92-1066, slip op. at 11 n.8, ___ F.2d ___ (1st Cir. Sept. 30, 1992)(discussing problem).

settle a case or otherwise indicates that it will not appeal.[4] Further, if the Secretary is correct and every sentence-four remand immediately starts the running of the filing period, the Court should also address whether its ruling should be given prospective application only, since it would catch thousands of claimants unaware.

Indeed, the immediate filing rule contradicts the directives that the Secretary still to this day gives claimants who obtain such remands (*see infra* App. 2a-3a)(form sent by Secretary to claimants in remand cases stating that the U.S. Attorney will return to district court for further proceedings after administrative remand is completed), which presents another issue for this Court and another basis for affirmance. *See infra* 18-23. Moreover, the retroactivity issue will soon pass as the circuits fall into line, and the Secretary has it fully within his power to eliminate any charge of misleading claimants by unilaterally revoking the advice that he gives claimants that he now believes is incorrect, thereby partially simplifying any future case that the Court might feel compelled to take on this issue.

Finally, the Court will need to revisit its 1990 decision in *Finkelstein*, 496 U.S. 617, which held that the merits of a sentence-four remand judgment are immediately appealable by the Secretary, but in the same breath stated that EAJA timeliness questions were separate and distinct. *Id.* at 628-31 & n.8. Contrary to the Secretary's position, there is nothing in *Melkonyan* that forbids the district court from, in effect, holding its fourth-sentence judgment in abeyance pending the administrative remand proceedings — the approach endorsed by the Eighth Circuit and by this Court in *Hudson*. *See* 490 U.S. at 887; *see also*

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[4] *Compare Myers v. Sullivan*, 916 F.2d 659 (11th Cir. 1990), and *Baker on Behalf of Baker v. Sullivan*, 956 F.2d 234, 235-36 (11th Cir. 1992), *with Fed'l Election Comm'n v. Political Contributions Data, Inc.*, No. 89 Civ. 5238 (SWK), slip op. at 5-8, ___ F. Supp. ___ (July 30, 1992).

Hafner v. Sullivan, No. 91-1634, slip op. at 6 n.3, 972 F.2d 249, ___ n.3 (8th Cir. Aug. 11, 1992)("As a matter of statutory construction and common sense, we see no reason why an appealable 'final judgment' under § 405(g) must necessarily be a 'final judgment' for purposes of § 2412(d)(1))(B)"). But according to the Secretary, *Finkelstein*'s holding on appealability applies to the EAJA, and requires that the statute of limitations starts to run immediately in every sentence-four case, no matter how inconsistent that may be with the orderly presentation of a fee application (*see infra* at 12-14).

Fortunately, there is no reason for this Court again to become enmeshed in this morass, which, as *Hudson*, *Finkelstein*, and *Melkonyan* show, lends itself to no easy *judicial* solution. *Congress*, not this Court, should have the opportunity to fix whatever problems remain after *Melkonyan*. One easy and obvious solution is to repeal the limitations period, which appears in only two federal fees statutes. Recently, the Administrative Conference of the United States formally recommended that the EAJA's statute of limitations either be repealed or run only from the completion of the administrative remand proceedings, and that recommendation has been transmitted to the relevant committees of Congress for consideration and published in the *Federal Register*. *See* 57 Fed. Reg. 30,101, 30,109 (July 8, 1992)(to be codified at 1 C.F.R. § 305.92-5). Congress may well choose a different solution, but whatever path Congress takes, it will be able to consider *all* of the difficulties at once. We are concerned that this Court should not, and cannot, comprehensively resolve these problems through case-by-case adjudication. Because this case does not present a significant substantive issue, nor any procedural issue bearing on the behavior that Congress wished to encourage or discourage in enacting the EAJA, we respectfully urge this Court to deny review.

B. The Proper Result is Affirmance, Not Reversal.

If this Court does grant review, plenary consideration is imperative. The post-*Melkonyan* case law makes clear that the issues here are not simple ones. As we now demonstrate, the Eighth Circuit's decision was correct, and the Secretary's view as to how a sentence-four remand case should be handled has no basis in the statutory language and defies common sense.

1. The Eighth Circuit's decision here was based on its eminently reasonable prior ruling in *Welter v. Sullivan*, 941 F.2d 674, which fully considered *Melkonyan*. In *Welter*, the court held that the district court's sentence-four *remand* did not constitute the sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment thereafter (Pet. App. 5a-6a). This is consistent with Rule 58 of the Federal Rules of Civil Procedure and both *Melkonyan* and *Hudson*.[5]

In *Hudson*, this Court held that work done in post-remand administrative proceedings is compensable under the EAJA because that work is necessary to the vindication of the claimant's rights. 490 U.S. at 885-90. As *Hudson* makes clear, the case there was not remanded because the Secretary requested a remand prior to filing his answer or because the district court found "good cause" for the taking of newly discovered "material" evidence (the only predicates for a sentence-six remand). Rather, the decision was reversed and remanded because the Secretary had ignored his own regulations and had failed to consider the cumulative effect of the claimant's disabilities (*id.* at 880-81) — a quintessential fourth-sentence remand. *See Labrie*, slip op. at 11 (Secretary concedes *Hudson* involved sentence-four remand).

[5] The Eighth Circuit has recently reaffirmed *Welter* in *Hafner v. Sullivan*, No. 91-1634, 972 F.2d 249 (Aug. 11, 1992).

Despite the fact that *Hudson* was remanded under sentence four, this Court specifically noted that the district court had entered a post-remand judgment of dismissal, *at* the Secretary's behest. *Hudson*, 490 U.S. at 881-82. The claimant then filed a fee application, which no one even intimated was untimely, and this Court affirmed an award of fees, both for in-court work and for counsel's time before the Secretary on remand. On the latter point, this Court held that the post-remand work was compensable because it was necessary "to the ultimate vindication of the claimant's rights . . .[,]" *id.* at 890, and repeatedly noted the district court's ability to retain jurisdiction in order to protect those rights. *Id.* at 886.

Significantly, *Finkelstein* and *Melkonyan* specifically reaffirmed *Hudson*. *Melkonyan*, 111 S. Ct. at 2162; *Finkelstein*, 496 U.S. at 629-31; *see Labrie*, slip op. at 17. The principal *holding* in *Melkonyan* was that a "final judgment" under 28 U.S.C. § 2412(d)(1)(B), may only be issued by a court, not an administrative agency, rejecting the Secretary's position that a post-remand decision of the Social Security Administration can be a "judgment" under the EAJA, thus starting the statute of limitations. 111 S. Ct. at 2162. The Court also agreed with the parties that the district court's remand was *not* one under sentence four, *id.* at 2163, and went on, in dicta, to say that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165 (emphasis added).

Here, the district court did not issue a *judgment* when it ordered a remand, realizing that it ought to retain jurisdiction until after it was determined whether the claimant had prevailed, as *Hudson* holds is usually appropriate. 490 U.S. at 886-87. Rather, it simply remanded the case under sentence four of 42 U.S.C. §

405(g), but postponed entry of its sentence-four judgment, and thus the running of the EAJA's statute of limitations, until after the administrative proceedings were completed. This is fully consistent with *Melkonyan*, which noted that, in order to trigger the statute of limitations, there must be a judgment "accompany[ing]" the post-remand order. 111 S. Ct. at 2165. Here, there was no judgment "accompanying" that order prior to the completion of the post-remand proceedings. *Accord Mendez v. Sullivan*, 792 F. Supp. 375, 378 (E.D. Pa. 1992). The court of appeals' decision is, thus, fully consistent with Rule 58 of the Federal Rules of Civil Procedure, which requires that the district court issue a separate judgment, *i.e.*, separate from the order remanding the case to the Secretary. *Id.*; *see also Labrie*, slip op. at 18.[6]

2. The Eighth Circuit's decision also makes practical sense. By holding its judgment in abeyance until the post-remand proceedings were completed, the district court was able to effectuate *Hudson* — *i.e.*, the court could determine whether the claimant had prevailed and, if so, whether he or she was entitled to fees for the post-remand proceedings. *Accord*, *Hafner*, slip op. at 5-6, 972 F.2d at ___. On the other hand, the rule suggested by the Secretary makes no sense. In this case, for instance, the Secretary complains that respondent's EAJA application was filed more than a year after the district court's remand order (Pet. 18-19). But it is inconceivable that the claimant could have done anything else but wait for the completion of the post-remand proceedings, since he had not yet prevailed, at least as the law stood at that time, because he had not yet been awarded any benefits. *See Hudson*, 490 U.S. at 887 (citing circuit precedent, including from Eighth Circuit).

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[6] Rule 58 provides in relevant part that "[e]very judgment shall be set forth in a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

Although the Secretary agrees that respondent had not prevailed at that point (Pet. 15-16), he argues, nevertheless, that the statute of limitations began to run when the remand order was entered. Thus, under the Secretary's "file early and often" view, the claimant must file a "protective" EAJA application in *every* sentence-four remand case and then await the completion of administrative proceedings. Then, *if* the claimant prevails on remand, the court may award attorney's fees (presumably after reviewing the remand proceedings). *Accord Hafner*, slip op. at 6, 972 F.2d at ___.

To put it bluntly, this scheme is ridiculous and, not surprisingly, finds little support in the post-*Melkonyan* case law. First, it completely ignores the terms of the EAJA itself, which require fee applicants to "allege that the position of the United States is not substantially justified[,]" and "show[ ] that the party is a prevailing party . . .." 28 U.S.C. § 2412(d)(1)(B). But, according to the Secretary, the claimant has not prevailed by obtaining a sentence-four remand, but must prevail on remand in order to meet that requirement. Therefore, the fee application simply cannot make the allegations required by the EAJA. Indeed, a claimant cannot "allege" a lack of substantial justification or "show" that he or she has prevailed, consistent with Rule 11 requirements, if he or she has not yet done so.

Second, as we have shown above (*supra* at 10-11), the Secretary's insistence on the filing of an EAJA application in every case is inconsistent with *Hudson*, in which there was a sentence-four remand, but the fee application was not filed until the post-remand proceedings had been completed. Moreover, *Melkonyan*, by repeatedly stating that prevailing party status is a prerequisite to the filing of a fee application, 111 S. Ct. at 2159, 2161, 2163, also strongly suggested that the filing of the fee application will coincide with the attainment of prevailing party status.

The best way to make sense of *Hudson* and *Melkonyan* is to allow, but not require, the district court to postpone issuing its sentence-four judgment until after the post-remand proceedings are completed, as the Eighth Circuit held here.

Finally, the Secretary's position would be unbelievably inefficient. It would require that, in *every* fourth-sentence remand case, the claimant file a fee application before he or she knew what the results of the post-remand proceedings were. Courts would thus be inundated with fee applications, even though, under the Secretary's view, many of these claimants will not even prevail in the post-remand proceedings. If the claimant loses on remand before the agency, there might be further judicial review of the merits of the action, and thus the fee application, might never, or only well into the future, be considered. "Thus, the Secretary's position would require the claimant to file an anticipatory EAJA petition at a time when it either must be denied or indefinitely suspended — the ultimate in laying traps for the unwary and senselessly cluttering court dockets." *Hafner*, slip op. at 4, 972 F.2d at ___. Absent clear language mandating such a result, the Court should not assume that Congress created such a preposterous scheme. To the contrary, not only is that language lacking here, but there is very strong evidence that Congress envisioned that fee applications would be filed only after the post-remand proceedings were completed, precisely as the Eighth Circuit held here. *See* H.R. Rep. No. 120, pt. 1, 99th Cong., 1st Sess. 19 (1985), 1985 U.S.C.C.A.N. 148. Given these absurdities, all doubts should be resolved against the Secretary's interpretation of the EAJA.[7]

[7] According to the Secretary's own data (Pet. 18 n.12), adoption of his position would involve the filing of thousands of superfluous fee applications, since ***non-prevailing*** parties, or at least not-yet prevailing parties, must file fee applications in order to be timely. A claimant's attorney could, of course, opt not to file a fee application at all, but that could pose a serious ethic

3. If, as the Secretary believes, *Melkonyan* mandates that the EAJA's statute of limitations is triggered in every sentence-four case by the issuance of the remand order, then the only sensible reading of *Melkonyan* is that a claimant who wins a sentence-four remand is a prevailing party who may be awarded fees at that point. As we have stated, this comports with the EAJA's language, since the statute requires that the claimant have prevailed at the time the fee application is filed. 28 U.S.C. § 2412(d)(1)(B). Furthermore, it avoids the utter irrationality of the system urged by the Secretary, in which claimants who have not prevailed, *and may never prevail*, must file fee applications in order to meet the statute of limitations (but for no other reason).

Although the Secretary blithely states in one short paragraph that the "answer" is so "clear" that the Court should reverse summarily (Pet. 18-19), he does not even cite the growing body of case law that holds that a claimant who has obtained a sentence-four remand has prevailed for EAJA purposes.[8] In *Dow v. Sullivan*, 774 F. Supp. 46 (D. Me. 1991), for example, the court held that:

> [a] sentence four remand terminates the "civil action" for which fees are available under 2412(d)(1)(A) [of the EAJA]. The "civil action" is

problem, since that attorney is obligated by law to return to the claimant the smaller of the EAJA fee and the contingent fee awarded under 42 U.S.C. § 406(b)(1). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note). In this case, respondent's attorney was awarded a contingent fee and ordered to pay the smaller EAJA fee to respondent (Pet. App. 9a).

[8] *See, e.g., Thomas for Brown v. Sullivan*, 785 F. Supp. 788, 792 (C.D. Ill. 1992); *Rollins v. Sullivan*, 784 F. Supp. 253, 254, 258 (E.D. Pa. 1992); *Spurlock v. Sullivan*, 783 F. Supp. at 479; *Mills v. Sullivan*, 782 F. Supp. 1347, 1349 (W.D. Mo. 1992); *Sesker v. Sullivan*, 779 F. Supp. 1042, 1044 (W.D. Mo. 1991); *Audette v. Sec'y of HHS*, 776 F. Supp. 84, 91 (D.R.I. 1991); *Dow v. Sullivan*, 774 F. Supp. 46, 48-49 (D. Me. 1991); *see also Luna v. Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991)(by implication).

> in fact terminated by our decision to reverse the Secretary and the Plaintiff has "prevailed" in this case. That is, the Plaintiff has succeeded in achieving substantially all of the benefit he sought in bringing the litigation, namely a reversal of the Secretary's decision.

Id. at 48-49 (footnote omitted). In *Audette v. Sec'y of HHS*, 776 F. Supp. 84 (D.R.I. 1991), the court was even more explicit:

> [U]nder sentence four the remand effectively ends speculation as to the final result. According to *Melkonyan*, a sentence four remand does make the claimant a prevailing party.

Id. at 91 (rejecting dicta to the contrary in *Fergason v. Sullivan*, 771 F. Supp. 1008, 1012 (W.D. Mo. 1991)).

As we have indicated, we believe that the Eighth Circuit's approach is more sensible and comports with this Court's decision in *Hudson*. But while it may seem anomalous to accord a claimant prevailing party status before the completion of post-remand proceedings, if the timing question is resolved as the Secretary urges, it is consistent with both § 405(g) and the EAJA that a claimant who obtains a remand under sentence four (but not an award of benefits) has prevailed for EAJA purposes at that point, because the government's position has been rejected by the court as a matter of law. This is so even though a claimant who obtains a sentence-six remand has not prevailed, because, under sentence six, the court "does not in any way rule as to the correctness of the administrative determination." *Dow*, 774 F. Supp. at 48. Indeed, frequently a sentence-six remand occurs because the claimant wants to present information to the ALJ of which neither he nor the Secretary was even aware when the Secretary's original decision was made. *Finkelstein*, 496 U.S. at 626. It is only after the post-remand submission of a new administrative record required by

sentence six, and the post-remand review contemplated by sentence seven, that the court will be in a position fairly to judge the Secretary's decision.

In a sentence-four case, however, a court's decision to reverse or modify the Secretary's decision *always* signifies that the Secretary has violated the law, and so it makes sense to say, at that point, that the claimant has prevailed. *See Luna*, 948 F.2d at 171; *Dow*, 774 F. Supp. at 48-9. In *Finkelstein*, for example, the sentence-four remand was part and parcel of the district court's invalidation of a federal regulation concerning eligibility for survivors' benefits. 496 U.S. at 624. Here, the district court's remand was necessary, among other things, to comply with the Eighth Circuit's precedent-setting ruling on the evaluation of pain, which the ALJ's decision had violated (36a).[9] Thus, here, as in any case remanded under sentence four, the court sent the case back to the Secretary with instructions to follow the legal precepts that he had previously breached, something which never occurs in a sentence-six case.

This distinction between claimants who benefit from sentence-four and those who benefit from sentence-six remands — with the former prevailing immediately and the latter awaiting the completion of proceedings on remand and post-remand review — accords with the purposes of the EAJA. The Supreme Court has recognized that the EAJA was intended to "'curb[] excessive regulations and the unreasonable exercise of Government authority . . .'" *Comm'r, INS v. Jean*, 496 U.S. 154, 165 & n.14 (1990) (*quoting* and *citing* H. R. Rep. No. 96-1418, p. 12 (1980)); *see also Hudson*, 490 U.S. at 883. The Secretary's failure to follow the law here was a perfect example of the type

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[9] *See Polaski v. Heckler*, 739 F.2d 1320 (8th Cir.), *reaffirmed*, 751 F.2d 943, 948-50 (8th Cir. 1984), *remanded*, 476 U.S. 1167 (1986), *reaffirmed*, 804 F.2d 457 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

of government conduct that the EAJA was intended to discourage, and an award of fees based on the remand, without more, would have served the statute's purposes.

4. If this Court believes that the Eighth Circuit erred in allowing respondent to file his fee application after the post-remand proceedings were completed, that decision should not be applied in this case. Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a court may give only prospective effect to decisions that establish new rules of law or overrule clear past precedent, because retroactive application would be inequitable to the party before the court and others similarly situated.[10]

Turning to the proceedings below and the relevant legal landscape, retroactive application of a rule allowing

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[10] We recognize that, under the patchwork plurality in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), a ruling cannot be applied prospectively here, if it were applied retroactively in *Melkonyan*, because *Beam* requires "pure prospectivity." *Id.* at 2448 (opinion of Souter, J.). However, the rule at issue here — the timing of fee applications in sentence-four remand cases — was not applied in *Melkonyan*, as both the parties and the Court agreed that the case there did not involve a sentence-four remand. 111 S. Ct. at 2163. *See, e.g., Rollins*, 784 F. Supp. at 257-58 (*Beam* does not bar prospective-only application of *Melkonyan*).

Further, the 30-day filing period is not a jurisdictional bar, like the one present in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981), which precludes the Court from engaging in retroactivity analysis. Rather, the provision here is worded virtually identically to 42 U.S.C. § 2000e-16(c), the statute of limitations considered in *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990). There, the Court held, as a general matter, that once Congress has waived the government's immunity, equitable principles apply to the same extent as in a suit among private parties, and that, therefore, statutes of limitations in actions against the government are not jurisdictional. *Id.* at 457. Accordingly, because the EAJA is a waiver of the federal government's immunity to fees and litigation expenses, its 30-day filing period is not jurisdictional, and ordinary retroactivity principles control. *See Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992)(EAJA's filing period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991)(same); *see also Sansano v. Sullivan*, 788 F. Supp. 218, 225 (D.N.J. 1992)(rejecting Secretary's reliance on *Firestone*); *Rollins*, 784 F. Supp. at 256 (same).

a sentence-four remand to trigger the EAJA's limitations period "would be anomalous indeed." *Chevron Oil*, 404 U.S. at 107. The remand order was issued on April 4, 1989 (26a). Ninety days later, or July 3, 1989, was less than a month after this Court's June 12, 1989 decision in *Hudson*, which made clear that fee applications should post-date the administrative decision on remand. This was fully consistent with the law nationwide, including the Eighth Circuit. *See, e.g., Swedberg v. Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *see also Brown v. Sec'y of HHS*, 747 F.2d 878, 887 (3rd Cir. 1984)(court relied on the Secretary's promise that he would, as a matter of policy, "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits") (emphasis in original).

On January 31, 1990, an ALJ found respondent to be disabled, and the Appeals Council did not review that ruling (Pet. App. 10a). An award certificate, determining the amount of benefits due respondent, was issued on June 12, 1990 (*id.*), and shortly thereafter, on July 17, 1990, respondent moved for entry of a final judgment and filed his EAJA application (*id.*). At no time prior to that point did the legal terrain portend that a sentence-four remand prior to a finding of disability could possibly trigger the filing deadline. The Secretary's position also remained constant, recognizing that the law required him, "at least for purposes of awarding attorney's fees" under the EAJA, to return to the district court, for a post-remand judgment to trigger the 30-day filing period. Secretary's Reply Brief at 12, *Sullivan v. Hudson*, 490 U.S. 877 (No. 88-616). Even in *Finkelstein* — which post-dated *Hudson* by about a year — the Secretary remained true to his prior position:

> Of course, it is appropriate for the Secretary to file *any* new decision awarding benefits with the

> court so that the court can consider whether attorney's fees should be awarded under the EAJA.

Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 496 U.S. 617 (No. 89-504)(emphasis added). It was not until *Melkonyan* was decided on June 10, 1991 that anyone could have conceivably thought that a fee application in a sentence-four case had to be filed shortly after the remand had occurred.

Moreover, elsewhere the Secretary has taken, and still takes, the position that a Social Security claimant has the absolute right to return to the district court on the merits and, therefore, presumably, for attorney's fees as well. 54 Fed. Reg. 37,789, 37,791 (1989). Furthermore, the forms *currently* used by the Secretary to inform claimants of ALJ decisions on remand, tell claimants that they have the right to return to the district court and that "we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court" (*infra* App. 2a-3a).

With this background in mind, we turn to the first of three *Chevron Oil* factors — whether the decision below established a new principle of law, either because it overruled clear past precedent or because it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 107. In applying this factor, we look to the law at the time that the underlying conduct, or the failure to act, took place. *Id*. at 106-09. There can be no question that, when the relevant event took place approximately two years before *Melkonyan* was decided — when respondent failed to divine the need to file his fee petition within 90 days of the issuance of the sentence-four remand in 1989 — the law unequivocally required the Secretary to return to the district court after remand to report the results of the proceeding, and thereby either continue or dismiss the pending civil action. Under the EAJA, it was equally clear that a final judgment from the district court after remand was necessary to trigger the 30-day limitations period, as the Secretary expressly told this Court in *Finkelstein*, and as the Court itself had indicated in *Hudson*. 490 U.S. at 887. Thus, a reversal of the decision below would establish a new principle of law, "by overruling clear past precedent on which litigants may have relied." *Chevron Oil*, 404 U.S. at 106.

Next, given the prior history of the 30-day rule and its purpose and effect, retroactive application of a new rule would plainly retard the purposes of the law. *Id*. at 106-07. Indeed, retroactive application would be inconsistent with the basic purposes of the EAJA which are to increase court access for individuals and to improve government policies. *Comm'r v. Jean*, 496 U.S. at 165 n.14. Moreover, retroactive application would be the very "trap for the unwary resulting in the unwarranted denial of fees" that Congress sought to eliminate in its 1985 EAJA amendments. H.R. Rep. No. 120, pt. 2, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 156 n.26.

Finally, retroactive application would produce substantially inequitable results, *Chevron Oil*, 404 U.S. at 107, as the facts of this case illustrate. Petitioner's counsel below, a small firm practitioner in Anoka, Minnesota, took this case on a contingent basis. After pursuing his client's claim for several years, and after the Secretary failed to file the administrative decision with the district court, counsel moved for entry of a final judgment and EAJA fees at a point considered timely under a settled nationwide practice. To deny respondent the right to recoup the fee that he has already paid his attorney "would surely be inimical to the beneficent purpose of the Congress." *Chevron Oil*, 404 U.S. at 108.

Moreover, retroactive application also would be unjust to the numerous other claimants and their lawyers who would otherwise suffer from reversal here. Attorneys with

pending EAJA applications relied on settled law and should not be penalized for doing so. More fundamentally, claimants will be damaged severely because, although their attorneys may still obtain a fee in many cases, such as this one, from *their* past-due benefits under 42 U.S.C. § 406(b)(1), a reversal here will, if applied retroactively, negate any possibility of an EAJA fee, thus creating the potential that claimants will suffer substantial losses of needed disability benefits. As Judge Pollak has put it, "it is difficult to believe that . . . the Supreme Court would have ordered retroactive application of its newly announced rule [in *Melkonyan*], because such a decision would have left without a remedy a large number of Social Security claimants who had relied on existing law." *Rollins*, 784 F. Supp. at 258 (footnote omitted).

Thus, if this Court chooses to reverse, it should give its ruling prospective effect only because, as in *Chevron Oil*, the "equities require[] nonretroactive application of the ... statute of limitations here." 404 U.S. at 109.[11]

5. Finally, even if the Court decides that *Chevron Oil* does not require prospective-only application, the filing period should be equitably tolled, as it was in *Luna v. Dep't of HHS*, 948 F.2d at 172-73, the case which the Secretary contends properly resolved the timeliness issue here. Noting that *Luna* tolled the limitations period

[11] The majority of courts that have considered the issue have applied *Melkonyan*'s sentence-four dicta prospectively only. *See, e.g., Sargent v. Sullivan*, No. 90-1521 (4th Cir. Aug. 22, 1991)(unpublished); *Mendez v. Sullivan*, 792 F. Supp. 375, 378 n.2 (E.D. Pa. 1992)(alternative holding); *Green v. Sullivan*, 788 F. Supp. 275, 276-78 (W.D. Va. 1992); *Sansano*, 788 F. Supp. at 222-25; *Bacon*, 786 F. Supp. at 438-41; *Thomas for Brown*, 785 F. Supp. at 791-93; *Rollins*, 784 F. Supp. at 256-58; *Lopez v. Sullivan*, 780 F. Supp. 496, 504 (N.D. Ill. 1991); *Santiago v. Sullivan*, 783 F. Supp. 223, 225-26 (E.D. Pa. 1992); *Butts v. Bowen*, 775 F. Supp. 1167, 1171-72 (N.D. Ill.), *reaffirmed*, 778 F. Supp. 453, 453-54 (N.D. Ill. 1981). *But see, e.g., Harpster v. Sullivan*, 793 F. Supp. 618, 621-22 (W.D. Pa. 1991)(would not be applied retroactively under *Chevron Oil* factors, but *Beam* requires retroactive application).

because the district court's remand order purported to retain jurisdiction, the Secretary argues cryptically that there is "no comparable predicate for an estoppel claim" here (Pet. 17 n.9). Actually, the situation here is quite similar to that in *Luna*, since the district court here did not enter judgment, but simply denied *both* parties' motions for summary judgment (Pet. App. 27a), thus evincing an obvious intent to retain jurisdiction (which made sense, as *Hudson* indicates, since that was the law at the time the district court's remand order was issued).

But it is the *Secretary's* actions that are most troubling. The Secretary promised in *Brown*, *supra*, that he would return to the court in *every* remanded case for entry of judgment, so that EAJA applications could be considered in an orderly fashion. The Secretary issued regulatory commentary to the same effect. 54 Fed. Reg. at 37,791 (claimants have absolute right to return to court after administrative decision on remand). It defies reason to suggest, as the Secretary does here, that respondent should be denied a fee after having taken actions fully consistent with the Secretary's own policies. Thus, there is more than sufficient reason to toll the statute of limitations in this case.[12]

* * *

If nothing else, this discussion amply illustrates that summary disposition is wholly inappropriate for a case of this complexity. But that does not mean that this Court should become embroiled in these issues so soon after *Melkonyan*, rather than allowing fee applicants and their attorneys to follow the applicable rules in their jurisdictions. If the problem is as important as the Secretary

[12] *See also Boronat v. Sullivan*, 788 F. Supp. 557, 561 (S.D. Fla. 1992)(equitable tolling); *Misciagno v. Sec'y of HHS*, 786 F. Supp. 1120, 1126 (E.D.N.Y. 1992)(relieving claimant from sentence-four judgment on account of surprise, inadvertence, or excusable neglect); *Ground v. Sullivan*, 785 F. Supp. 1407, 1410 & nn.2 & 3 (S.D. Cal. 1992)(declaring prior judgment null and void, thus establishing timeliness of claimant's application); *Robinson v. Sullivan*, 783 F. Supp. 245, 248 (E.D.N.C. 1991).

says it is, Congress will surely agree and fix it. Meanwhile, the Court should leave this situation alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 16, 1992

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

SSN: [omitted]

[Claimaint's name
[and address omitted]

Date mailed: MAY 29 1992

[Attorney's name
[and address omitted]

NOTICE OF ADMINISTRATIVE
LAW JUDGE DECISION
PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.0. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council will assume that you received the notice within five days after the date at the top of this notice unless you show you did not receive it within the five-day period.
- If you need more time to file your written exceptions, you must file a written request for additional time with

the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.
- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.
- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.
- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.
- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.
- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review the decision on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing

with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

Replaces Form HA-L99-U6

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No. 92-911

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-311

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. This case presents a single, straightforward question: Whether respondent's application for attorney's fees under the Equal Access to Justice Act (EAJA) was timely. As we explain in the certiorari petition (at 9-16) and at pages 6-10, *infra*, it was not. Under the unambiguous terms of EAJA and 42 U.S.C. 405(g), as well as this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2165 (1991), respondent was required to file his fee application within 30 days of when the district court's April 5, 1989, remand order was no longer appealable. Respondent missed that deadline by more than a year.

The Eighth Circuit's contrary ruling plainly warrants review by this Court. Respondent concedes (Br. in Opp. 4)

that the decision below conflicts with *Luna* v. *United States Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991). He also concedes (Br. in Opp. 5) that the question of when an EAJA application must be filed in a Social Security case remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g) is a broadly recurring one, because several thousand cases are remanded to the Secretary each year. See Pet. 18 & n.12. Indeed, since *Melkonyan* was decided, that issue has been decided by four courts of appeals and is pending in at least three others,[1] and we have filed another certiorari petition presenting the same issue. *Sullivan* v. *Gutierrez*, petition for cert. pending, No. 92-361. This is a textbook example of a case that warrants certiorari.

2.a. Respondent nevertheless goes to great lengths to oppose certiorari. He first contends (Br. in Opp. 4-6) that the circuit conflict is "tolerable" because it concerns only attorney's fees (not substantive entitlement to benefits), and because litigants can simply follow whichever one of the disparate filing rules that governs in the circuit where their cases arise. But this Court frequently grants review on attorney's fee issues, as it did in *Melkonyan* and *Sullivan* v. *Hudson*, 490 U.S. 877 (1989). In fact, the Court granted review in *Melkonyan* despite the absence of a circuit conflict. Moreover, respondent's position that the circuit conflict is not worthy of resolution by this Court because litigants can simply follow circuit precedent would effectively bar review of *any* procedural issue.

[1] In addition to the decisions of the Fifth Circuit in *Luna* and the Eighth Circuit in this case, *Welter* v. *Sullivan*, 941 F.2d 674 (1991), and *Hafner* v. *Sullivan*, 972 F.2d 249 (1992), the First and Tenth Circuits have rendered decisions that agree with the result reached by the Eighth Circuit in this case. See *Labrie* v. *Secretary of HHS*, No. 92-1066 (1st Cir. Sept. 30, 1992); *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992), petition for cert. pending, No. 92-361. The issue remains pending in the Sixth, Ninth and Eleventh Circuits. See *Iker* v. *Sullivan*, No. 92-5233 (6th Cir.); *Engelbrite* v. *Secretary of HHS*, No. 91-16920 (9th Cir.); *Newsome* v. *Sullivan*, No. 91-8917 (11th Cir.).

Congress has enacted a statute that imposes a single, nationwide limitation on the filing of EAJA applications, but the uniform scheme Congress designed cannot be restored absent review by this Court.[2]

b. Respondent also contends (Br. in Opp. 6-9) that certiorari should be denied because this case requires resolution of issues in addition to when an EAJA application must be filed following a sentence four remand. Even if respondent were correct that other issues are necessarily presented, that would scarcely support *denial* of the petition. Logically, it should lead the Court to grant review and consider those additional issues as well. In any event, respondent's premise is incorrect.

(i) Respondent argues (Br. in Opp. 7) that if the Court were to grant review, "it would have to deal comprehensively with the difficulties engendered by this Court's decisions in *Finkelstein* and *Hudson*, as well as *Melkonyan*." Specifically, he asserts (Br. in Opp. 7) that "the Court would need to determine not only when a sentence-four fee application should be filed, but whether a claimant is a prevailing party entitled to fees by virtue of obtaining a sentence-four remand alone," and would "also need to determine whether the rule in *Hudson*—that work done in post-remand administrative proceedings are compensable

[2] Respondent notes (Br. in Opp. 6 & n.1) that many other attorney's fee statutes do not contain filing deadlines and that district courts have adopted local rules imposing various time limits for filing applications under those statutes. See *White* v. *New Hampshire*, 455 U.S. 445, 454 (1982). Respondent suggests that the solution to the problem presented by the conflicting judicial rulings at issue here is the same as the solution under those other statutes: "unless and until Congress acts to provide uniformity, lawyers will consult the appropriate rule and file their fee applications accordingly." See Br. in Opp. 6. Respondent, of course, ignores the fact that Congress *has* "act[ed] to provide uniformity" under EAJA. The courts of appeals are divided on what that uniform rule is, and they have no authority to fashion filing rules at variance with the statute. See 28 U.S.C. 2071(a), 2072(b).

under the EAJA—applies in sentence-four cases." Respondent is wrong. The Court need not resolve either of those issues, much less "deal comprehensively" with the entire range of potential EAJA issues in this context.

The question whether a claimant may be regarded as a "prevailing party" solely by virtue of obtaining a remand pursuant to sentence four, as respondent urges if the EAJA filing period commences at that point (see Br. in Opp. 15-18)—or whether a claimant instead becomes a "prevailing party" only after benefits are awarded on remand, as this Court and the courts of appeals have heretofore concluded (see Pet. 15-16)—simply does not arise in this case. Whatever the correct answer to that question, respondent's application must be denied because he failed to satisfy the *threshold* requirement that he file his application within 30 days of when the remand order was no longer appealable. Similarly, no issue was raised in the court of appeals as to whether respondent could properly be awarded fees under *Hudson* for services his attorney rendered in the administrative proceedings on remand; accordingly, the question whether such fees can ever be awarded in a case involving a sentence-four remand is not before the Court. In addition, there is no circuit conflict on the prevailing-party and *Hudson*-fee issues that requires resolution by this Court.

(ii) Respondent further argues (Br. in Opp. 7-8, 18-23) that this case will present retroactivity issues if the Court grants review and holds that a sentence-four remand triggers the EAJA filing period. Respondent argues that such an interpretation should not be applied retroactively, but that if it is, equitable tolling of the 30-day limit should then be addressed as well. However, respondent did not make those arguments in the court of appeals,[3]

[3] Amicus Mid-Minnesota Legal Assistance did make those arguments below (C.A. Br. 5-16), but respondent did not join in them.

and there accordingly is no reason why this Court should consider them. Moreover, the retroactivity and tolling issues, like the other issues respondent belatedly raises, have generated no circuit conflict that would warrant review by this Court.[4]

Nor do those issues have any substantial continuing importance. The only claimants who would have even a colorable argument in support of nonretroactivity or tolling would be those whose cases were remanded *prior* to *Melkonyan*, which expressly stated that an EAJA application must be filed within 30 days of when a sentence-four remand becomes final and not appealable. 111 S. Ct. at 2165. The number of such claimants will diminish rapidly in the near future, because it has now been more than sixteen months since *Melkonyan* was decided. For the foregoing reasons, if the Court believes that the nonretroactivity and tolling issues might remain open in this case despite respondent's failure to raise them below, the Court should remand the case to the court of appeals to consider those issues in the first instance. Compare *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 297-298 (1987).[5]

[4] Respondent cites only one court of appeals decision declining to apply *Melkonyan* retroactively—the unpublished decision in *Sargent* v. *Sullivan*, 941 F.2d 1207 (4th Cir. 1991) (Table). Similarly, in addition to the Fifth Circuit's decision in *Luna*, respondent cites only a smattering of district court decisions on the equitable tolling issue in this context. See Br. in Opp. 22-23 & n.12.

[5] Respondent's broad nonretroactivity argument is without merit in any event. The rule that an EAJA application must be filed within 30 days of when a sentence-four remand is no longer appealable was expressly stated in *Melkonyan* and was foreshadowed by *Finkelstein*, which held such a remand appealable. There accordingly is no merit to respondent's contention that any reiteration of that rule should be given purely prospective effect from the date of the Court's decision in the *instant* case. In addition, retroactivity is "overwhelming the norm." *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2443 (1991)

c. Finally, respondent urges (Br. in Opp. 9) the Court to deny review because Congress could resolve the issue by amending EAJA. That is not a basis for denying review. Congress has the power to resolve any of the numerous questions of statutory construction that this Court chooses to consider each Term. Although the Administrative Conference of the United States has recommended that the EAJA filing period be repealed or begin to run only after proceedings on remand have been completed, see *ibid.* (citing 57 Fed. Reg. 30,101, 30,109 (1992)), it is pure speculation whether Congress will even consider (much less enact) any such amendment in the foreseeable future. This Court, however, can and should promptly resolve the timeliness issue, and thereby put an end to the widespread litigation on that issue in the lower courts.

3. Respondent's limited attempt to defend the Eighth Circuit's timeliness ruling on the merits (Br. in Opp. 10-12) is unavailing. Conspicuously absent from his discussion is any analysis of the controlling statutory text. EAJA requires that a fee application be filed "within thirty days of final judgment in the action," and "final judgment" is defined to mean "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). Sen-

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(opinion of Souter, J.); see also *id.* at 2449-2450 (opinion of Blackmun, J.) (retroactivity required in all cases); *id.* at 2450-2451 (opinion of Scalia, J.) (same). Here, that result is required by the jurisdictional nature of EAJA's 30-day filing period, because "a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). See Gov't C.A. Br. 14-16; Gov't C.A. Reply Br. 8-18. Finally, prospective application of the rule we urge is not required to further the purpose of EAJA (cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971)), which is to remove the deterrent to challenging government action that results from the inability to retain counsel. See *Hudson*, 490 U.S. at 883. Respondent and other claimants who might be affected by the Court's enforcement of the 30-day filing requirement in this case have, by definition, *not* been deterred from retaining an attorney or from challenging the Secretary's decision denying benefits.

tence four of 42 U.S.C. 405(g) provides that a court "shall have power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Thus, a remand order under sentence four is ancillary to and must be entered "in conjunction with" a "judgment" affirming, modifying, or reversing the Secretary's decision. *Melkonyan*, 111 S. Ct. at 2164, 2165. Sentence eight of Section 405(g) in turn provides that such a judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions" (emphasis added). In light of this explicit text of 42 U.S.C. 405(g), the Court held in *Finkelstein* that an order entered pursuant to sentence four is a "final judgment" that may be appealed pursuant to 28 U.S.C. 1291, even if it includes a remand to the Secretary. 496 U.S. at 625, 629.

In this case, respondent does not and could not dispute that the district court's April 5, 1989, order was entered pursuant to sentence four of 42 U.S.C. 405(g), and therefore was appealable: that order expressly "reversed" the Secretary's decision and remanded to the Secretary for further proceedings. Pet. App. 26a-27a. It follows that the 30-day period within which respondent was required to file his EAJA application began to run after the 60-day period for appealing the April 5, 1989, order expired, which was on June 4, 1989. Respondent's EAJA application, which was filed on July 17, 1990, was more than a year out of time.

Respondent seeks to avoid that result by asserting (Br. in Opp. 10) that "the district court's sentence-four *remand* did not constitute the sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment thereafter." There is no indication that the district court actually intended to retain jurisdiction after the remand; its docket sheet shows that the case was closed. The Eighth Circuit instead has held that a district court automatically retains jurisdiction to enter a post-

remand judgment in *any* sentence-four case that is remanded for further proceedings, rather than merely for payment of benefits. See *Hafner*, 972 F.2d at 252.

Nothing in sentence four of 42 U.S.C. 405(g) or EAJA permits a district court to evade the finality of a judgment that contains a remand order—and prevent commencement of EAJA's 30-day filing period—by remanding to the Secretary under sentence four in some manner *other* than by entry of a "judgment," while retaining jurisdiction to enter a judgment after proceedings on remand have been completed. As this Court explained in *Finkelstein*, Section 405(g) contemplates a post-remand filing with the court and entry of a post-remand judgment only in cases remanded pursuant to sentence six of that Section. See 496 U.S. at 626-627. Moreover, *Finkelstein* specifically rejected the notion that a district court has the option to remand a case pursuant to sentence four without entering a judgment. See 496 U.S. at 629 (quoted at Pet. 13).[6]

In arguing otherwise, respondent relies entirely on the discussion in *Hudson* concerning the authority of a district court under 42 U.S.C. 405(g) to retain jurisdiction

[6] Respondent also errs in relying (Br. in Opp. 10, 12) on the requirement in Fed. R. Civ. P. 58 that a judgment be set forth on a separate document. Respondent did not argue below that the district court's April 5, 1989, order was not an appealable judgment because no separate document was issued at the time, and he therefore has waived that argument. Indeed, he waived that argument at least by the time he participated in the administrative proceedings contemplated by the remand order without insisting upon issuance of a separate document. Cf. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978). In any event, a failure to comply with Rule 58 neither renders a judgment non-final nor deprives an appellate court of jurisdiction. *Bankers Trust*, 435 U.S. at 386 & n.7. Accordingly, and contrary to respondent's apparent view, Rule 58 does not grant a district court power to set aside the Secretary's decision and order a remand pursuant to sentence four, but to insulate that remand from appellate review and prevent commencement of the EAJA filing period by withholding the formality of setting forth its judgment in a separate document.

and enter a post-remand judgment. See Br. in Opp. 10-12. *Hudson*, however, did not distinguish between different kinds of remands. See 490 U.S. at 884-888. This Court subsequently made clear in *Finkelstein* that the statutory provisions on which *Hudson* relied in discussing the retention of jurisdiction and post-remand filings and judgments are confined to sentence-six remands, 496 U.S. at 626-627, and the Court specifically declined to follow the language in *Hudson* that might have suggested that a sentence-four remand order is not a final judgment, *id.* at 629-631.

Similarly, in *Melkonyan*, the Court stated that there is only a "narrow class" of administrative proceedings that may be considered so intimately connected with the judicial proceedings as to be part of the "civil action" for purposes of an award of fees under EAJA, and it defined that class to consist of only those cases in which " 'a formal complaint within the jurisdiction of a court of law' *remains pending and depends for its resolution upon the outcome of the administrative proceedings*." 111 S. Ct. at 2162 (quoting *Hudson*, 490 U.S. at 892). In cases remanded pursuant to sentence four, the complaint challenging the Secretary's decision denying benefits does not "remain pending" or "depend[] for its resolution upon the outcome of the administrative proceedings." To the contrary, the district court must enter a final judgment that disposes of the case (by reversing or modifying the Secretary's decision and remanding to the Secretary for further proceedings), and the Secretary's new decision on remand then "will be reviewable by a separate piece of litigation." *Finkelstein*, 496 U.S. at 625.[7] Consistent with

[7] The Court further stated in *Melkonyan* that *Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative

this statutory scheme, the Court made clear in *Melkonyan* that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Respondent's reliance on *Hudson* in support of the quite different rule adopted by the Eighth Circuit is thus foreclosed by both *Finkelstein* and *Melkonyan*.[8]

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted and the judgment of the court of appeals should be summarily reversed.

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Solicitor General

OCTOBER 1992

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level." 111 S. Ct. at 2162. *Finkelstein* makes clear that a district court has that authority only in cases remanded pursuant to sentence six.

[8] In light of the discussion in the text, respondent exaggerates considerably in asserting (Br. in Opp. 11) that *Finkelstein* and *Melkonyan* "specifically reaffirmed" *Hudson*. Both decisions pointedly limited the very implications of the *Hudson* opinion on which respondent relies here. As respondent points out (Br. in Opp. 10), it appears that if the Court in *Hudson* had focused upon the distinction between sentence-four and sentence-six remands that was subsequently identified in *Finkelstein* and *Melkonyan*, the remand order in *Hudson* itself would probably have been classified as a sentence-four remand. But *Hudson* did not draw any such distinction, and it therefore does not—in the wake of *Finkelstein* and *Melkonyan*—stand for the proposition that a district court may retain jurisdiction and enter a post-remand judgment (which in turn would trigger the EAJA filing period) in those cases that are remanded pursuant to sentence four. The reasoning of the latter two decisions therefore limits *Hudson* to sentence-six cases.

Supreme Court, U.S.
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No. 92-311

In the Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In this action for judicial review of the denial of a claim for Social Security disability benefits, the district court, in accordance with sentence four of 42 U.S.C. 405(g), reversed the Secretary's decision and remanded for further proceedings. The question presented is:

Whether, in light of *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991), the court of appeals correctly held that the district court's remand order was not a "final judgment" that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is Louis W. Sullivan, the Secretary of Health and Human Services. Respondent, the plaintiff below, is Richard H. Schaefer.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 960 F.2d 1053 (Table). The prior opinion of the court of appeals in *Welter* v. *Sullivan* (Pet. App. 3a-8a), on which the court relied in this case, is reported at 941 F.2d 674. The opinions of the district court and reports of the magistrate (Pet. App. 9a-12a, 13a-25a, 26a-27a, 28a-41a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1992. On July 16, 1992, Justice Blackmun

extended the time within which to file a petition for a writ of certiorari to and including August 15, 1992 (a Saturday). The petition was filed on August 17, 1992 (a Monday) and was granted on November 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides:[1]

> [1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or

[1] Because of the length of 42 U.S.C. 405(g), we have inserted numbers in brackets to identify its separate sentences.

> without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8]

The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

2. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, provides in relevant part:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought * * * . The party shall also allege that the position of the United States was not substantially justified. * * *

* * * * *

(2) For purposes of this subsection—

* * * * *

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

* * * * *

STATEMENT

This case involves the timeliness of an application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in an action for judicial review of the denial by the Secretary of Health and Human Services of a claim for Social Security benefits. Under EAJA, a fee application must be filed "within thirty days of final judgment in the action." 28 U.S.C. 2412(d)(1)(B). EAJA defines the term "final judgment" to mean "a judgment that is final and not appealable." 28 U.S.C. 2412(d)(2)(G). The specific question presented here is when the 30-day period for filing an EAJA fee application commences in a case in which the district court reverses the Secretary's decision and remands the cause to the Secretary for further proceedings pursuant to sentence four of 42 U.S.C. 405(g). Sentence four provides that the district court "shall have the power to enter, upon the pleadings and transcript of [the] record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

1. In June 1986, respondent filed an application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.* His application was denied at all levels of the administrative appeals process, and he then sought judicial review

pursuant to 42 U.S.C. 405(g). By order entered April 4, 1989, the district court "reversed" the Secretary's decision and remanded the case to the Secretary for further consideration in light of the court's order. Pet. App. 26a-27a; see also *id.* at 28a-41a (magistrate's recommendation).[2] The Secretary did not appeal that order. The district court's docket sheet states that the case was then closed.

Following the remand, the ALJ, in a decision dated January 31, 1990, found respondent disabled. That decision became final 60 days later, when the time for review by the Appeals Council expired. Pet. App. 10a; see 20 C.F.R. 404.984.

2. On July 18, 1990, respondent filed an application in the district court for attorney's fees under EAJA.[3] The district court disposed of that motion on August 26, 1991, after this Court rendered its decision in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991). In *Melkonyan*, the Court stated that in cases remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g), the 30-day filing period under EAJA "begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no

[2] The district court concluded that the administrative law judge (ALJ) failed to evaluate respondent's subjective complaints of pain in accordance with Eighth Circuit precedent, that the ALJ did not properly analyze respondent's back injuries, and that the ALJ's assessment of respondent's residual functional capacity to engage in his past work was not supported by the medical evidence in the record as a whole. Pet. App. 26a-27a.

[3] The district court's opinion erroneously states that the fee application was filed on July 17, 1990.

longer appealable." 111 S. Ct. at 2165. In light of *Melkonyan*, the Secretary argued that the "final judgment" for purposes of EAJA was the district court's order of April 4, 1989, which reversed the Secretary's decision denying benefits and remanded to the Secretary for further proceedings. That order became "not appealable," 28 U.S.C. 2412(d)(2)(G), on June 3, 1989, upon expiration of the 60-day period allowed by Fed. R. App. P. 4(a)(1) for taking an appeal. Consequently, the Secretary argued, respondent's EAJA application was untimely because it was not filed within 30 days of June 3 (*i.e.*, by July 3, 1989), as required by 28 U.S.C. 2412(d)(1)(B), but instead was filed more than one year later (on July 18, 1990). Pet. App. 10a-12a.

The district court rejected the Secretary's argument and held that respondent's fee application was timely. It found the timeliness issue in this case to be controlled by the Eighth Circuit's post-*Melkonyan* decision in *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991) (*reproduced at* Pet. App. 3a-8a), which had been decided only 17 days earlier. *Welter* involved consolidated cases in which the district court had ordered remands to the Secretary pursuant to sentence four of 42 U.S.C. 405(g). After securing benefits on remand, each claimant applied for attorney's fees under EAJA, well in excess of 30 days after expiration of the time for appealing the remand orders. Purporting to distinguish *Melkonyan*, the Eighth Circuit held in *Welter* that the district court's orders in that case, though governed by sentence four of 42 U.S.C. 405(g), were not "final 'judgment[s] . . . modifying or reversing the decision[s] of the

Secretary' " within the meaning of that sentence; instead, the Eighth Circuit reasoned, "the district court retained jurisdiction of the claimants' cases and planned to enter dispositive sentence four judgments after the Secretary reevaluated the claimants' applications for benefits." Pet. App. 5a. "Because the parties did not report to the district court after the Secretary awarded benefits to the claimants" on remand, the Eighth Circuit concluded, "no final judgments ha[d] been entered," and the EAJA applications were still timely. *Id.* at 6a.[4]

The district court in the instant case determined that, under *Welter*'s analysis, "no final judgment ha[d] been entered" here as well, and that respondent's fee application therefore was timely. Pet. App. 12a. Proceeding to the merits of the application, the district court concluded that the position of the United States was not substantially justified, and it awarded respondent $1,372.50 in attorney's fees and $120 in costs under EAJA. *Id.* at 9a; see also *id.* at 17a-18a (magistrate's recommendation).[5]

[4] Although the Eighth Circuit held that the fee applications in *Welter* were timely, it affirmed the district court's finding in each case that the government's position was substantially justified. Pet. App. 6a-8a. Because the court of appeals' judgments therefore were in favor of the Secretary, we did not seek review of the timeliness issue in this Court.

[5] The district court also held that respondent's counsel was entitled under Section 206(b)(1) of the Social Security Act, 42 U.S.C. 406(b)(1), to an award of attorney's fees out of respondent's past-due benefits. See *Bowen* v. *Galbreath*, 485 U.S. 74, 76 (1988). The court awarded counsel $2,287.50 in fees under that provision, subject to counsel's refunding to respondent the amount of fees awarded against the government

3. The Secretary filed a notice of appeal and requested the court of appeals to consider the appeal en banc because *Welter* constituted binding circuit precedent on the timeliness issue. The court of appeals denied that motion. Thereafter, the panel, considering itself bound by *Welter*, held that respondent's fee application was timely, and it affirmed the district court's award of fees in an unpublished per curiam opinion dated April 17, 1992. Pet. App. 1a-2a.[6]

SUMMARY OF ARGUMENT

a. Under the express terms of 42 U.S.C. 405 and EAJA, as well as *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2165 (1991), respondent's fee application was untimely. EAJA requires a fee application to be filed within 30 days of the "final judgment" in a civil action, which is defined to mean a "judgment" that is "final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). Under sentence four and sentence eight of 42 U.S.C. 405(g) and *Finkelstein*, the district court's April 4, 1989 order in this case, which reversed the Secretary's decision denying benefits and remanded

under EAJA ($1,372.50), as required by Section 3 of the 1985 amendments to EAJA (Pub. L. No. 99-80, § 3, 99 Stat. 186; 42 U.S.C. 406(b)(1)). See Pet. App. 9a; *id.* at 18a-24a (magistrate's recommendation). No question is presented here concerning the award of fees to counsel under 42 U.S.C. 406(b)(1), which were paid out of respondent's past-due benefits.

[6] In the court of appeals the Secretary did not challenge the district court's finding that the government's position was not substantially justified or its determination of the amount of the fees. We likewise have not presented those issues here.

for a rehearing, was an appealable "final judgment" under 28 U.S.C. 1291. That order became "not appealable" 60 days later (on June 3, 1989), when the time for taking an appeal under Fed. R. App. P. 4(a)(1) expired. Respondent's fee application, filed on July 18, 1990, was therefore more than a year out of time.

b. Contrary to the court of appeals' view, a district court cannot permit circumvention of the 30-day filing requirement by purporting to remand the case under sentence four without entering a final judgment, and instead retaining jurisdiction to enter a final judgment after proceedings on remand are completed. As 42 U.S.C. 405(g) makes clear (and as *Finkelstein* and *Melkonyan* confirm), a remand under sentence four is ancillary to—and must "accompany" and be entered "in conjunction with"—a "judgment," and sentence eight deems such a judgment to be "final." The district court accordingly has no authority to postpone entry of a "final judgment" when it remands to the Secretary in circumstances such as these.

c. This Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), does not justify a departure from the text of 42 U.S.C. 405(g) and EAJA. The Court in *Hudson* discussed the authority of a district court under 42 U.S.C. 405(g) to retain jurisdiction during the remand and to enter a post-remand judgment after the Secretary has made a further filing with the Court. *Hudson*, however, did not focus on the distinction between sentence four and sentence six remands. *Finkelstein* subsequently made clear that the statutory provisions on which *Hudson* relied in this discussion are confined to sentence six remands,

and *Melkonyan* similarly limits the implications of the *Hudson* opinion.

d. Nor is a departure from the text of 42 U.S.C. 405(g) and EAJA justified by the fact that, under established precedent, a claimant does not become a fully prevailing party following a sentence four remand unless he is awarded benefits on remand. The 30-day filing period begins to run when the time for appealing the remand order expires, but a definitive resolution of prevailing party status must await completion of proceedings on remand. In other words, securing a reversal of the Secretary's decision denying benefits and a remand to the Secretary is a necessary but not a sufficient condition for an award of fees; the remaining element for full prevailing party status, which is in the nature of a condition subsequent, is satisfied later if the claimant is awarded benefits. The filing rule required by the text of 42 U.S.C. 405(g) and EAJA therefore both respects established prevailing party jurisprudence and ensures the prompt filing of EAJA applications.

ARGUMENT

RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT WAS UNTIMELY

A. UNDER THE TERMS OF 42 U.S.C. 405(g) AND EAJA, AS WELL AS THIS COURT'S DECISIONS IN *FINKELSTEIN* AND *MELKONYAN*, RESPONDENT WAS REQUIRED TO FILE HIS APPLICATION WITHIN 30 DAYS AFTER EXPIRATION OF THE TIME FOR APPEALING THE APRIL 1989 REMAND

This case presents a single, straightforward question: Whether respondent's application for attorney's fees under the Equal Access to Justice Act (EAJA) was timely. Under the unambiguous terms of EAJA (28 U.S.C. 2412(d)(1)(B) and (2)(G)) and this Court's decisions in *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990), and *Melkonyan* v. *Sullivan*, 111 S.Ct. 2157, 2165 (1991), respondent was required to file his fee application within 30 days of when the district court's April 4, 1989, remand order was no longer appealable. Respondent missed that deadline by more than a year.

1. In *Melkonyan*, this Court observed that *Finkelstein* identified two kinds of remands under 42 U.S.C. 405(g): "(1) remands pursuant to the fourth sentence, and (2) remands pursuant to the sixth sentence." *Melkonyan*, 111 S. Ct. at 2163 (citing *Finkelstein*, 496 U.S. at 624-627). Although in *Finkelstein* the Court "did not state explicitly * * * that these were the *only* kinds of remands permitted under the statute," 111 S. Ct. at 2164, it did so in *Melkonyan*. There, the Court held, in light of "Congress' explicit delineation in § 405(g) regarding

the circumstances under which remands are authorized," that Congress "intended to limit the district court's authority to enter remand orders to these two types." *Ibid.*

Sentence four of 42 U.S.C. 405(g) provides that the district court "shall have [the] power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Thus, a remand pursuant to sentence four is ancillary to--and must "accompany" and be entered "in conjunction with"—a "judgment" affirming, modifying, or reversing the Secretary's decision on the merits. *Melkonyan*, 111 S. Ct. at 2165. Sentence eight in turn provides that such a judgment "shall be *final* except that it shall be subject to review in the same manner as a judgment in other civil actions" (emphasis added). Based on this explicit statutory text, the Court held in *Finkelstein* that an order entered pursuant to sentence four of 42 U.S.C. 405(g) is a "final judgment" and may be appealed as such pursuant to 28 U.S.C. 1291, even if it includes a remand of the cause to the Secretary for further proceedings. 496 U.S. at 625, 629. As the Court explained in *Finkelstein*, a sentence four remand order "terminate[s] the civil action challenging the Secretary's final determination that [the claimant] was not entitled to benefits," 496 U.S. at 624-625, and Section 405(g) does not require the Secretary to file anything further in the district court following completion of the administrative proceedings on remand, 496 U.S. at 625-627. Accordingly, if the Secretary's new decision on remand should again

deny the claimant's application for benefits, that decision will be subject to judicial review in a "separate piece of litigation" instituted by the claimant pursuant to 42 U.S.C. 405(g). 496 U.S. at 625.

A district court also has authority, in limited circumstances, to remand a case to the Secretary pursuant to sentence six of 42 U.S.C. 405(g). Under the first clause of sentence six, the court may, on motion of the Secretary made for good cause shown before he files his answer to the complaint, remand the case to the Secretary for further action; the court also may, at any time, order that additional evidence be taken before the Secretary, but only upon a showing that there is new and material evidence and that there is good cause for the failure to incorporate the evidence in the record in the prior administrative proceedings. Because a sentence six remand does not terminate the civil action challenging the Secretary's decision denying benefits—and because the district court therefore retains jurisdiction during the administrative proceedings on remand—the second clause of sentence six requires the Secretary to file with the court any additional or modified findings of fact or decision he renders on a sentence six remand (along with a supplemental transcript), so that the district court may then render its final sentence four judgment in the case. See *Finkelstein*, 496 U.S. at 627-628.[7]

[7] Sentence seven of 42 U.S.C. 405(g) provides that the "additional or modified findings of fact and decision" rendered on a sentence six remand "shall be reviewable only to the extent provided for review of the original findings of fact and decision."

2. It is undisputed in this case that the district court's April 1989 remand order was entered pursuant to sentence four of 42 U.S.C. 405(g). See, *e.g.*, Br. in Opp. 3, 7, 8. That order expressly "reversed" the Secretary's decision denying respondent's claim for benefits and remanded for further proceedings (*i.e.*, for a "rehearing" by the Secretary). Under EAJA, a fee application must be filed within 30 days of the "final judgment" in the civil action, which is defined to mean a "judgment" that is "final and not appealable." 28 U.S.C. 2412(d)(1)(B) and (2)(G). Under sentence eight of 42 U.S.C. 405(g) and *Finkelstein*, the district court's April 4, 1989, remand order under sentence four was an appealable "final" judgment.[8] That order became "not appealable" 60 days later (on June 3, 1989), when the time for taking an appeal under Fed. R. App. P. 4(a)(1) expired. Under the plain terms of 28 U.S.C. 2412(d)(1)(B), respondent then had

[8] This Court noted in *Finkelstein* that the order there was unquestionably a "judgment," because "it terminated the civil action challenging the Secretary's final determination that respondent was not entitled to benefits, set aside that determination, and finally decided that the Secretary could not follow his own regulations in considering the disability issue." 496 U.S. at 625. Similarly here, the district court's 1989 order terminated the civil action challenging the Secretary's final decision denying respondent's claim for benefits, "reversed" that decision, and finally decided that the ALJ had not properly evaluated respondent's allegations of pain or his back injuries and that the ALJ's assessment of respondent's ability to perform his past work was not supported by the medical evidence in the record as a whole. Pet. App. 26a-27a.

30 more days—until July 3, 1989—within which to file a fee application. *Melkonyan* removes any doubt about this statutory requirement, for it states that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. It follows that the application respondent eventually filed on July 18, 1990, was more than a year out of time.[9]

B. THE DISTRICT COURT COULD NOT DEFEAT COMMENCEMENT OF EAJA'S 30-DAY FILING PERIOD BY PURPORTING TO RETAIN JURISDICTION TO ENTER A FINAL JUDGMENT AFTER COMPLETION OF THE ADMINISTRATIVE PROCEEDINGS ON REMAND

Despite the clarity of the relevant statutory provisions and decisions of this Court, the court of appeals held—affirming the district court's EAJA award on the basis of *Welter*—that the district court's 1989 order was *not* a final judgment. Pet. App. 2a. Instead, the court reasoned in *Welter* and this case that the district court "retained jurisdiction" for purposes of entering a final judgment after proceedings on remand were completed. *Id.* at 2a, 5a.

[9] It is irrelevant that the district court in this case did not label its April 1989 remand order a "final judgment." As the Court explained in *Finkelstein*, 496 U.S. at 628 n.7: "The label used by the District Court of course cannot control the order's appealability in this case, any more than it could when a district court labeled a non-appealable interlocutory order as a 'final judgment.' See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976)."

Because the parties had not reported to the district court after the Secretary awarded benefits on remand, the Eighth Circuit further reasoned in *Welter* that no final judgment had yet been entered and that the fee application filed more than a year later was therefore still timely. Pet. App. 5a-6a, 12a.[10] This rationale not only permits a district court to evade Congress's decision to impose a 30-day filing requirement under EAJA, it also conflicts with the text of 42 U.S.C. 405(g) and with *Finkelstein* and *Melkonyan*.[11]

[10] In his brief in opposition (at 10), respondent sought to defend the Eighth Circuit's decision in this case on the same ground, arguing that "the district court's sentence-four *remand* did not constitute a sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment thereafter."

[11] There is no indication in this case (as there was none in *Welter*) that the district court actually intended to retain jurisdiction and to enter a final judgment after proceedings on remand were completed. See Pet. App. 27a. To the contrary, the district court's docket sheet shows that the case was closed following the remand. The Eighth Circuit instead has adopted an absolute rule that a district court *automatically* retains jurisdiction to enter a post-remand judgment in *any* case in which the district court remands to the Secretary pursuant to sentence four, except where the court itself finds the claimant entitled to benefits and remands with directions to pay benefits. See *Hafner* v. *Sullivan*, 972 F.2d 249, 252 (8th Cir. 1992). Indeed, it does not appear that an order of the latter sort even qualifies as a "remand" under sentence four, since it *forecloses* a "rehearing" of the merits by the Secretary. Accordingly, under the Eighth Circuit's rule, no sentence four remand order would ever be a "final judgment"—in direct contravention of *Finkelstein*.

There is no suggestion in 42 U.S.C. 405(g) that a district court may remand to the Secretary by "retaining" jurisdiction to enter its judgment only after completion of the administrative proceedings following the remand. To the contrary, as the text of 42 U.S.C. 405(g) makes clear (and as *Finkelstein* and *Melkonyan* confirm), a remand under sentence four must accompany and be entered in conjunction with a "judgment," and sentence eight deems such a judgment to be "final." 496 U.S. at 625, 629; 111 S. Ct. at 2164, 2165. The district court accordingly has no authority to postpone entry of a "final judgment" when it remands to the Secretary in circumstances such as these. The Court made that very point in *Finkelstein*, explaining (496 U.S. at 629):

> [T]he fourth sentence directs the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order. The fourth sentence does not require the district court to choose between entering a final judgment and remanding; to the contrary, it specifically provides that a district court may enter judgment "with or without remanding the cause for a rehearing."

Nor is there any provision in 42 U.S.C. 405(g) for the Secretary to "report" to the district court following completion of proceedings on a sentence four remand, as the Eighth Circuit contemplated in *Welter*. See Pet. App. 6a. In this respect, sentence four stands in marked contrast to sentence six, which expressly directs the Secretary to file the revised findings and decision he renders on remand with the district court, so that the court may then enter its

final sentence four judgment after reviewing the revised findings and decision. See page 14, *supra*. The Court made clear in *Finkelstein* that this requirement of a post-remand filing by the Secretary applies only where the remand was pursuant to sentence six of 42 U.S.C. 405(g), and that no such requirement is imposed on the Secretary following a sentence four remand. 496 U.S. at 625-626.

The Court in *Finkelstein* also specifically rejected the argument (which was essentially adopted by the Eighth Circuit here and in *Welter*) that following a sentence four remand, "the district court may enter an appealable final judgment upon reviewing the Secretary's postremand 'additional or modified findings of fact and decision.'" 496 U.S. at 626 (quoting sentence seven of 42 U.S.C. 405(g)). The Court explained that "[t]he postremand review conducted by the District Court under the seventh sentence refers only to cases that were previously remanded under the sixth sentence." 496 U.S. at 626-627. Section 405(g) makes no provision for such a role by the district court following a remand made pursuant to sentence four.[12]

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[12] Respondent also relies (Br. in Opp. 10, 12) for the post-remand filing rule he urges on the requirement in Fed. R. Civ. P. 58 that a judgment be set forth on a separate document. But respondent did not argue below that the district court's April 4, 1989, order was not an appealable judgment because no separate document was issued at the time, and he therefore has waived that argument. Indeed, he waived that argument at least by the time he participated in the administrative proceedings contemplated by the remand order without insisting upon issuance of a separate document. Cf. *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978). In any event, a failure to

It was in light of this statutory scheme that the Court held in *Melkonyan* that "[i]n sentence six cases, the [EAJA] filing period does not begin until after postremand proceedings are completed, the Secretary returns to court, the court enters a final judgment, and the appeal period runs," but that in sentence four cases, the filing period begins immediately after the order that includes the remand is entered by the district court and the period for appealing that order has run, with no postponement for completion of the administrative proceedings on remand. 111 S. Ct. at 2165. The Eighth Circuit's decisions here and *Welter* obliterate this carefully drawn statutory distinction between sentence four and sentence six ~~remands~~.[13]

The correct approach to this issue, by contrast, is represented by the Fifth Circuit's decision in *Luna* v.

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comply with Rule 58 neither renders a judgment non-final nor deprives an appellate court of jurisdiction. *Bankers Trust*, 435 U.S. at 386 & n.7. Accordingly, and contrary to respondent's apparent view, Rule 58 does not grant a district court power to set aside the Secretary's decision and order a remand pursuant to sentence four, but to insulate that remand from appellate review—and to prevent commencement of the EAJA filing period—by withholding the formality of setting forth its judgment in a separate document.

[13] The First and Tenth Circuits have rendered decisions on the timelieness issue here that agree with the result reached by the Eighth Circuit in this case. See *Labrie* v. *Secretary of HHS*, No. 92-1066 (1st Cir. Sept. 30, 1992); *Gutierrez* v. *Sullivan*, 953 F.2d 579 (10th Cir. 1992), petition for cert. pending, No. 92-361. The issue also is raised in cases pending in the Sixth, Ninth and Eleventh Circuits. See *Iker* v. *Sullivan*, No. 92-5233 (6th Cir.); *Engelbrite* v. *Secretary of HHS*, No. 91-16920 (9th Cir.); *Newsome* v. *Sullivan*, No. 91-8917 (11th Cir.).

Department of HHS, 948 F.2d 169 (5th Cir. 1991). There, the court held, relying on *Finkelstein* and *Melkonyan*, that "*every* fourth-sentence remand order is a 'final judgment' * * * for purposes of the EAJA and section 405(g), and the EAJA's thirty-day time [begins] running at the point at which that final judgment [has] been entered and the period for appeal thereof [has] run." 948 F.2d at 171-172 (emphasis added); see also *Frizzell* v. *Sullivan*, 937 F.2d 254, 256-257 (5th Cir. 1991). The Fifth Circuit therefore held in *Luna* that the 30-day filing period began to run upon expiration of the period for appealing the remand order, even though the district court in that case (unlike the district court here, see note 11, *supra*) expressly purported to retain jurisdiction during the administrative proceedings on remand and directed the parties to file status reports with the court. See 948 F.2d at 171.[14]

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[14] The Fifth Circuit went on to hold in *Luna* that the 30-day filing period should be equitably tolled in the circumstances of that case, because the district court's remand order purported to retain jurisdiction, "thus unwittingly misleading Luna to think that no final judgment was being entered," and because the Secretary had apparently acquiesced in the form of the remand order. 948 F.2d at 173. The Fifth Circuit observed, however, that "[p]rospective claimants, cognizant of *Frizzel* and [*Luna*], presumably could not make the same equitable claim." 948 F.2d at 173 n.5.

Respondent did not make an equitable tolling argument in the court of appeals in this case, and he accordingly has waived that argument. Such an argument would be without merit in any event. In the first place, as the Eighth Circuit recognized in *Welter*, Pet. App. 5a, the 30-day filing period under EAJA is jurisdictional. A number of courts had so held prior to EAJA's amendment in 1985, see *Action on Smoking & Health* v. *CAB*,

C. A DEPARTURE FROM THE TEXT OF 42 U.S.C. 405(g) AND EAJA, AND FROM THE REQUIREMENTS OF *FINKELSTEIN* AND *MELKONYAN*, IS NOT JUSTIFIED BY THIS COURT'S PRIOR DECISION IN *HUDSON*

In attempting to defend the judgment below, respondent relied in his brief in opposition almost entirely on the discussion in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), concerning the authority of a district court under 42 U.S.C. 405(g) to retain jurisdiction and enter a post-remand judgment. See Br. in Opp. 10-12. *Hudson*, however, did not distinguish between remands made pursuant to sentence four and those made pursuant to sentence six. See 490 U.S. at 884-888. This Court subsequently made clear in *Finkelstein* that the statutory provisions on which *Hudson* relied in discussing a district court's

724 F.2d 211, 225 (D.C. Cir. 1984); *Premachandra* v. *Mitts*, 753 F.2d 635, 642 n.10 (8th Cir. 1985); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985), and the legislative history of the 1985 amendments shows that it was so understood. See, *e.g.*, S. Rep. No. 856, 98th Cong., 2d Sess. 16 (1984). The Fifth Circuit in *Luna* did not address the jurisdictional nature of EAJA itself. It instead rested its ruling on the fact that *substantive* claims under 42 U.S.C. 405(g) are subject to equitable tolling. See 948 F.2d at 173 (citing *Bowen* v. *City of New York*, 476 U.S. 467 (1985)). That is not a basis for tolling the distinct, government-wide filing deadline for fee applications under EAJA. But even if tolling might be permissible in some circumstances under EAJA, the predicates for the Fifth Circuit's ruling to that effect in *Luna* are lacking here: as we have pointed out (see note 11, *supra*), the district court's remand order in this case did not expressly purport to retain jurisdiction, and the Secretary did not acquiesce in any such order.

retention of jurisdiction and post-remand filings by the Secretary and post-remand judgments by the district court are confined to sentence six remands. 496 U.S. at 626-627. Indeed, the Court specifically declined to follow the language in *Hudson* that might have suggested that a sentence four remand order is not a final judgment. 496 U.S. at 629-631.

Similarly, in *Melkonyan*, the Court stated that there is only a "narrow class" of administrative proceedings that may be considered so intimately connected with the judicial proceedings as to be part of the "civil action" for purposes of an award of fees under EAJA, and it defined that class to consist of only those cases in which " 'a formal complaint within the jurisdiction of a court of law' *remains pending and depends for its resolution upon the outcome of the administrative proceedings.*" 111 S. Ct. at 2162 (quoting *Hudson*, 490 U.S. at 892). In cases remanded pursuant to sentence four, the complaint challenging the Secretary's decision denying benefits does not "remain[] pending" after the remand or "depend[] for its resolution upon the outcome of the administrative proceedings." To the contrary, the district court must enter a final judgment that disposes of the case (by reversing or modifying the Secretary's decision and remanding to the Secretary for further proceedings), and the Secretary's new decision on remand then "will be reviewable by a separate piece of litigation." *Finkelstein*, 496 U.S. at 625. The Court further explained in *Melkonyan* that *Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following

the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level." 111 S. Ct. at 2162. After *Hudson*, the Court held in *Finkelstein* that a district court has that authority only in cases remanded pursuant to sentence six. 496 U.S. at 625-627.

Consistent with this statutory scheme, the Court made clear in *Melkonyan* that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Respondent's reliance on *Hudson* in support of the quite different rule adopted by the Eighth Circuit is thus foreclosed by both *Finkelstein* and *Melkonyan*.

Against this background, respondent exaggerates considerably in asserting (Br. in Opp. 11) that *Finkelstein* and *Melkonyan* "specifically reaffirmed" *Hudson*. Both decisions pointedly limited the very implications of the *Hudson* opinion on which respondent relies here. As respondent points out (Br. in Opp. 10), it appears that if the Court in *Hudson* had focused upon the distinction between sentence four and sentence six remands that was central to the analysis in its subsequent decisions in *Finkelstein* and *Melkonyan*, the remand order in *Hudson* itself would have been classified as a sentence four remand. But *Hudson* did not identify the statutory distinction between sentence four and sentence six remands. Accordingly, in the wake of *Finkelstein* and *Melkonyan*, *Hudson* does not stand for the proposition that a district court may retain jurisdiction to enter a post-remand judgment—and thereby postpone

the EAJA filing period—in those cases that are remanded pursuant to sentence four. In short, *Finklelstein* and *Melkonyan* necessarily limit *Hudson* to cases remanded pursuant to sentence six.

D. THE COMMENCEMENT OF THE 30-DAY FILING PERIOD CANNOT BE AVOIDED ON THE GROUND THAT A CLAIMANT IS NOT FULLY A "PREVAILING PARTY" UNLESS HE IS AWARDED BENEFITS ON REMAND

1. The Eighth Circuit expressed the view in *Welter* that its holding that an EAJA application need not be filed until the administrative proceedings on remand have been completed was justified by the fact that "the claimants did not become prevailing parties eligible for attorney's fees until the Secretary reevaluated their cases and awarded them benefits." Pet. App. 6a (citing *Sullivan* v. *Hudson*, 490 U.S. at 887). The Eighth Circuit's underlying premise of when a claimant becomes a prevailing party was, of course, correct. This Court found it "clear" in *Hudson* that "a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings," and noted that "the vast majority of the Courts of Appeals" had "come to this conclusion." 490 U.S. at 887;[15] accord, *Finkelstein*, 496 U.S. at 630; see

[15] See, *e.g.*, *McGill* v. *HHS*, 712 F.2d 28 (2d Cir. 1983), cert. denied, 465 U.S. 1068 (1984); *Brown* v. *HHS*, 747 F.2d 878, 883 (3d Cir. 1984); *Gamber* v. *Bowen*, 823 F.2d 242, 244 (8th Cir. 1987); *Swedberg* v. *Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *Escobar* v. *Bowen*, 857 F.2d 644 (9th Cir. 1988); *Paulson* v. *Bowen*, 836 F.2d 1249, 1252 (9th Cir. 1988).

also H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985) (report on 1985 amendments to EAJA)(noting that under EAJA case law, a claimant ordinarily was not regarded as a prevailing party solely by virtue of obtaining a remand to the Secretary). And even before *Hudson*, this Court had held that to be considered a prevailing party, the plaintiff must point to a resolution of the dispute that has changed the legal relationship between himself and the defendant. *Texas State Teachers Ass'n* v. *Garland Indep. School Dist.*, 489 U.S. 782, 792 (1989); *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987); see *Hudson*, 490 U.S. at 886-887.

However, the Eighth Circuit was wrong in *Welter* to believe that, in order to give effect to this established "prevailing party" jurisprudence, it was necessary to hold that an order under sentence four that contains a remand to the Secretary is not a "final judgment" that (after the time for appeal has expired) triggers EAJA's 30-day filing period. Pet. App. 6a. As we have explained, where a case is remanded pursuant to sentence four, the 30-day filing period under EAJA begins to run after the final judgment of remand is entered and the appeal period has run. But a definitive determination of prevailing party status must await completion of the proceedings on remand. As a result, a claimant would be entitled to EAJA fees only if he files a fee application within 30 days after the remand order is no longer appealable, the Secretary awards benefits on remand, and the district court finds that the government's position was not substantially justified.

Put another way, securing the reversal and remand from the district court is a necessary, but not a sufficient, condition for attaining full prevailing party status. That element must of course be satisfied when the claimant files his or her EAJA application. The remaining element (an award of benefits on remand)—which is, in essence, a condition subsequent—may be satisfied later. This interpretation of the statutory scheme is both reasonable and practicable; it is fully consistent with both 42 U.S.C. 405(g) and EAJA; and it properly gives effect to both *Melkonyan* and *Finkelstein* on the one hand and the prevailing party jurisprudence endorsed by *Hudson* and *Finkelstein* on the other.[16]

[16] Respondent contends (Br. in Opp. 15-18) that if a sentence four remand order is a final judgment that triggers EAJA's 30-day filing period, the claimant should be regarded as a prevailing party at that point, without regard to whether he ultimately recovers the benefits he seeks. This argument conflicts with the circuit precedent discussed above (see note 15, *supra*), and respondent cites holdings only by district courts in support of the new rule he proposes. In any event, it is not necessary for the Court to revisit that issue in this case. For even if respondent were correct that a claimant should be regarded as a prevailing party if the district court remands the case pursuant to sentence four, respondent's application still must be denied because he failed to satisfy the *threshold* requirement that he file his application within 30 days of when the remand order was no longer appealable.

When the amendments to EAJA were considered in 1984, the House bill would have deemed a Social Security claimant who obtained a remand under 42 U.S.C. 405(g) to be a "prevailing party," and would have required the claimant to file an EAJA application within 30 days of obtaining the remand order. H.R. 5479, 98th Cong., 2d Sess. § 2(a)(3) and

2. Respondent contends (Br. in Opp. 13) that under this rule, a claimant who seeks fees after a sentence four remand cannot satisfy the requirements of 28 U.S.C. 2412(d)(1)(B) that a party seeking fees under EAJA file an application "which shows that the party is a prevailing party" and "allege[s] that the position of the United States was not substantially justified." Respondent is wrong. The application can readily show that the claimant has satisifed the necessary element of prevailing party status to that point (that he has obtained from the court a reversal or modification of the Secretary's decision denying benefits and a remand for a rehearing), and can allege that the position of the United States was not substantially justified. If the claimant is then awarded benefits on remand, he will have satisfied the remaining element that is necessary for full prevailing party status.

(b)(3) (1984); see H.R. Rep. No. 992, 98th Cong., 2d Sess. 2-3, 12-13 (1984); 130 Cong. Rec. 29,276 (1984). The Senate version would have provided certain exceptions to the prevailing party rule in the House bill, with the result that a claimant who obtained a remand would not be regarded as a prevailing party if, *inter alia*, he did not thereafter prevail on remand (see § 2(a)(3), amending 28 U.S.C. 2412(d)(1)(B)); and under the Senate version, the claimant would have been permitted to file an EAJA application within 30 days of when he prevailed on remand (§ 2(b)(3), adding a new 28 U.S.C. 2412(d)(2)(H)(iii)). See 130 Cong. Rec. 30,151 (1984). The House and Senate could not reach agreement on statutory language to address remands in Social Security cases, *id.* at 30,152, 30,153-30,154, 31,406-31,407, and no such provisions were included in the 1985 EAJA amendments as finally passed.

The rule required by the text of 42 U.S.C. 405(g) and EAJA, and by *Finkelstein* and *Melkonyan*, makes practical sense as well. It clearly identifies the stage of the litigation at which the EAJA application must be filed, and it assures that applications are filed promptly, as EAJA's short 30-day filing period plainly contemplates. Thousands of Social Security cases are remanded to the Secretary each year,[17] and it is important to the sound and efficient administration of both the Social Security program and EAJA that there be clear rules for courts and litigants to follow regarding the filing and prompt disposition of EAJA applications.

By contrast, under the approach proposed by the court of appeals and respondent, an EAJA application need not be filed until after proceedings on remand have been completed, some "report" of undefined content has been filed with the district court (if the claimant prevails on remand), and the district court has entered a post-remand "judgment" on the basis of that report. See Pet. App. 6a. Nothing in 42 U.S.C. 405(g) or EAJA imposes any deadline for filing such a "report" with the district court, or even identifies which party would be responsible for doing so. As a result, disposition of the fee application could be greatly delayed.

[17] In 1989, the Appeals Council processed 6,432 remands. See Social Security Administration, *Annual Report to the Congress* 29 (Apr. 1990). In 1990, it processed 4,344 remands, Social Security Administration, *Annual Report to Congress* 34 (Apr. 1991), and in 1991, it processed 2,526. Social Security Administration, *Annual Report to Congress* 38 (Apr. 1992).

In short, neither established prevailing party precedents nor practical considerations justify a departure from the clear rule required by the plain language of 42 U.S.C. 405(g) and 28 U.S.C. 2412(d), and by this Court's construction of those statutory provisions in *Finkelstein* and *Melkonyan*. The Court accordingly should reaffirm that clear rule for the benefit of the hundreds of district judges and thousands of litigants annually who must consider the question of when an EAJA application must be filed if a Social Security case has been remanded to the Secretary pursuant to sentence four of 42 U.S.C. 405(g).[18]

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[18] Respondent argues (Br. in Opp. 7-8, 20-23) that if the Court holds that an EAJA application must be filed within 30 days of when a sentence four remand order becomes not appealable, that holding should be applied only prospectively. However, respondent did not make a non-retroactivity argument in the court of appeals, and there is no reason why this Court should consider it.

Nor does the issue warrant review by this Court. The non-retroactivity issue has not generated a circuit conflict; respondent cites (Br. in Opp. 22) only one court of appeals decision declining to apply *Melkonyan* retroactively— the Fourth Circuit's unpublished decision in *Sargent* v. *Sullivan*, 941 F.2d 1207 (4th Cir. 1991)(Table). Moreover, the only claimants who would have even a colorable argument in support of nonretroactivity would be those whose cases were remanded pursuant to sentence four of 42 U.S.C. 405(g) *prior* to *Melkonyan*, which expressly stated that an EAJA application must be filed within 30 days of when a sentence four remand becomes final and not appealable. The number of such claimants will diminish rapidly in the near future, since it has now been more than eighteen months since *Melkonyan* was decided. Finally, even if we assume arguendo that respondent's non-retroactivity argument is not entirely foreclosed (see Reply Br. 5-6 n.5 (petition stage))—especially since the filing deadline is jurisdictional, see note 14, *supra*; *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981)—resolution of that issue in a particular case might well depend on whether there was clear circuit precedent on the question at the time of the pre-*Melkonyan* sentence four remand. See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-109 (1971); *St. Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608-609 (1987). For the foregoing reasons, if the Court believes that the nonretroactivity issue might remain open in this case despite respondent's failure to raise it below, the appropriate course would be for the Court to remand the case to the court of appeals to consider that issue in the first instance. Compare *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 297-298 (1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1993

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QUESTIONS PRESENTED

1. Was the court of appeals below correct in holding that respondent's fee application under the Equal Access to Justice Act was timely, where the district court had remanded the case to the agency for further proceedings, resulting in an award of disability benefits to respondent, and respondent's fee application was filed prior to the district court's issuance of a post-remand judgment?

2. If not, should this Court's ruling be given prospective effect only because when respondent filed his fee application it was timely under all then-existing precedent and all of the agency's pronouncements on the subject?

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In The

Supreme Court of the United States

October Term, 1992

No. 92-311

DONNA E. SHALALA, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENT

This case concerns the statute of limitations under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(B), which requires a party who has prevailed in litigation with the federal government to file an application for attorney's fees "within thirty days of final judgment in the action." Generally speaking, a prevailing party who has filed a timely application is entitled to a fee unless the government can show that its position in the case was "substantially justified." *Id.* § 2412(d)(1)(A). The specific issue here is whether, in a social security disability case remanded by the district court to the Social Security Administration for further proceedings under the fourth sentence of 42 U.S.C. § 405(g), a claimant may file an application for attorney's fees after a favorable conclusion of the remand proceedings, as the court of appeals held, or

whether every claimant who obtains a sentence-four remand must file a fee application shortly after the case is remanded, even before the claimant has prevailed, as the petitioner Secretary of Health and Human Services contends.

As we show below, the Eighth Circuit's decision, now joined by three other circuits, follows necessarily from the plain language of the EAJA. The Secretary's position, which has garnered very little support among the lower courts, is at odds not only with the EAJA's plain language, but also the Secretary's own previously announced policies. That position also makes no practical sense, since it would require claimants who obtain a remand to file fee applications with the district court that *always* would be premature, and would be superfluous in almost 40% of all cases sent back to the Agency, where the claimant fails to prevail on remand.

STATEMENT OF THE CASE

In June 1986, respondent Richard H. Schaefer filed an application for social security disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, which was denied at the administrative level by petitioner Secretary of Health and Human Services (the "Secretary"). Respondent then sought review under 42 U.S.C. § 405(g) in the United States District Court for the District of Minnesota which, on April 5, 1989, reversed the Secretary's decision on various legal grounds, denied both parties' motions for summary judgment, and remanded for further administrative proceedings (Pet. App. 27a). The court did not at that time enter a separate judgment pursuant to Federal Rule of Civil Procedure 58.

Thereafter, pursuant to the district court's ruling, the Secretary considered the case anew, and, on January 31, 1990, an administrative law judge ("ALJ") found that respondent was disabled (Pet. App. 10a). When the Secretary's Appeals Council did not review that determination within the time allowed by law (*id.*), *see* 20 C.F.R. §§ 404.983, .984, the Secretary issued an award certificate to respondent (Pet. App. 10a). Shortly thereafter, respondent moved for entry of a final judgment in the district court and filed an EAJA application requesting

attorney's fees for 18.3 hours spent securing respondent's entitlement to benefits (*id.*).

The Secretary opposed the fee application as untimely under the EAJA's statute of limitations, 28 U.S.C. § 2412(d)(1)(B), because the application had not been filed within 30 days of the administrative decision on remand, as was required by the Ninth Circuit's decision in *Melkonyan v. Heckler*, 895 F.2d 556, 558 (1990). The magistrate rejected that position (Pet. App. 16a), on the ground that only a post-remand district court judgment could trigger the EAJA's statute of limitations, relying on this Court's decision in *Sullivan v. Hudson*, 490 U.S. 877 (1989), and Eighth Circuit precedent. The magistrate also found that the position of the United States had not been substantially justified (Pet. App. 17a) and recommended an award of fees under both the EAJA and 42 U.S.C. § 406(b)(1), which authorizes a fee to be paid out of the claimant's past-due benefits (Pet. App. 18a).

After the magistrate made his recommendation, this Court ruled in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), that the EAJA's limitations period runs only from court judgments, not from the decisions of administrative agencies, thus repudiating the Ninth Circuit's view upon which the Secretary had relied. The Secretary then changed gears and argued to the district court that respondent's fee application should have been filed within 90 days of the issuance of the district court's remand order, *even though respondent had not won his claim for benefits at that point.* The Secretary noted that the EAJA's statute of limitations requires that fee applications be filed within 30 days of "final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and that "final judgment" is defined as a "judgment that is final and not appealable." *Id.* § 2412(d)(2)(G). Thus, the Secretary asserted, because an appeal against the government must be taken within 60 days of entry of judgment under Fed. R. App. P. 4(a), respondent's fee application was not timely because it had not been filed within 90 days of the district court's remand order.

In making this argument, the Secretary relied on dicta in this Court's decision in *Melkonyan*, which she maintained requires that the EAJA's statute of limitations be triggered

immediately in all cases remanded for further administrative proceedings under sentence four of 42 U.S.C. § 405(g), even though the claimant will not yet have prevailed at that point.

The district court rejected the Secretary's reading of *Melkonyan* (Pet. App. 9a), on the basis of the Eighth Circuit's then-recent decision in *Welter v. Sullivan*, 941 F.2d 674 (1991). *Welter* held that, in social security cases remanded under sentence four of § 405(g), a district court has jurisdiction under the EAJA to hold in abeyance its entry of a "final judgment" under 28 U.S.C. § 2412(d)(1)(B) until after the claimant prevails in the administrative remand proceedings. *Welter* relied on this Court's decision in *Hudson*, *supra*, 490 U.S. at 887, which had noted that claimants generally do not become prevailing parties until after the remand proceedings are completed (Pet. App. 12a).

The district court stated that, as was true in *Welter*, it had not entered a dispositive judgment in conjunction with its remand order, and that, therefore, the fee application was timely (*id.*). The district court also affirmed the magistrate's finding that the Secretary's position was unreasonable on the merits and awarded EAJA fees of $1,372.50 (Pet. App. 9a). The court ordered respondent's attorney to refund the EAJA fee to respondent, allowing the attorney to retain only the $2,287.50 contingent fee from respondent's back benefits (Pet. App. 9a). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note) (requiring refund of smaller award to claimant).

On appeal, the Secretary abandoned the claim that her position had been substantially justified. While conceding that *Welter* controlled (Pet. App. 2a), the Secretary continued to maintain that *Melkonyan* rendered respondent's fee application untimely. The court of appeals affirmed on the basis of *Welter* (*id.*).

Before explaining why the court of appeals' decision was correct, two points deserve special emphasis. First, respondent's decision to seek fees only after the administrative proceedings on remand had been completed was fully consistent with — indeed *demanded by* — applicable law. *See, e.g., Gamber v. Bowen*, 823 F.2d 242, 244 (8th Cir. 1987); *Cook v. Heckler*, 751 F.2d 240, 241 (8th Cir. 1984); *accord Hudson*, 490 U.S. at 887. Moreover, the Secretary herself, through regulations and in litigation, had specifically endorsed that approach on a nationwide basis. *See Brown v. Sec'y of HHS*, 747 F.2d 878, 884 (3d Cir. 1984); 54 Fed. Reg. 37,789, 37,791 (1989).

Second, because prevailing social security disability claimants are generally quite poor and, if they prevail, will depend principally, if not exclusively, on their modest disability payments, the loss of an EAJA award will have a significant effect on those claimants' lives.[1] Here, for instance, because respondent's lawyer had been paid out of respondent's past-due benefits, he was legally obligated to return the EAJA award to his client, and so it is *respondent's* money, not his lawyer's, that is at stake. In short, a reversal here would diminish respondent's disability recovery, even though the Secretary's position on the merits was concededly unreasonable.

SUMMARY OF ARGUMENT

The EAJA's statute of limitations provides that a party seeking an award of fees and other expenses shall file a fee application "within thirty days of final judgment in the action . . . ." 28 U.S.C. § 2412(d)(1)(B). Construing these words most naturally, a case is not "final" for fees purposes until it can be determined whether the claimant has prevailed, which, in social security cases remanded to the Secretary for further proceedings, does not occur until *after* the results of those proceedings are known. Although *Sullivan v. Finkelstein*, 496 U.S. 617, 619 (1990), holds that the Secretary may appeal a social security case, such as this one, remanded under sentence-four of 42 U.S.C. § 405(g) as a "final decision" under 28 U.S.C. § 1291, that ruling does not govern the timing of fee applications under the EAJA, as this Court itself noted. *Finkelstein*, 496 U.S. at 628-30 & n.8; *see Hafner v. Sullivan*, 972 F.2d 249, 252 n.3 (8th Cir. 1992).

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[1] The average monthly social security disability payment in 1991 was $587. Social Security Admin., *Social Security Bulletin, Annual Statistical Supplement* 150, Table 5.A.1. (Dec. 1991).

The EAJA also requires that the fee application "show[ ] that the party is a prevailing party . . . [,]" 28 U.S.C. § 2412(d)(1)(B), an allegation that the claimant simply cannot make at the time the case is remanded for further proceedings. Indeed, between 30% and 40% of claimants *lose* on remand. By holding its judgment in abeyance until the post-remand proceedings were completed, the district court was able to effectuate the requirement that a fee applicant be a prevailing party at the time the application is filed. This also enabled the district court to effectuate this Court's decision in *Sullivan v. Hudson*, 490 U.S. 877 (1989), which held that social security claimants are eligible for EAJA fees for work done in post-remand proceedings.

Apart from the fact that it draws no support from the text of the EAJA, the Secretary's position would result in extraordinary inefficiencies. If the Secretary had her way, in *every* sentence-four case remanded for further proceedings, claimants would be required to file premature fee applications, even though many of those claimants will not even prevail in the post-remand proceedings. Thus, the plain terms of the EAJA and common sense require affirmance.

If, however, the Court reverses the Eighth Circuit's ruling, that decision should be applied prospectively only. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). At the time that the Secretary says respondent should have filed his fee application, such a filing would have been considered premature under all then-existing precedent and the Secretary's own policies. Thus, retroactive application would be unfair to respondent and others similarly situated. *Id.* at 109.

ARGUMENT

I. THE EAJA'S STATUTE OF LIMITATIONS MAY ONLY BE TRIGGERED BY A DISTRICT COURT JUDGMENT ISSUED AFTER THE CLAIMANT HAS WON HIS OR HER CLAIM FOR BENEFITS.

A. Introduction

This case involves the interaction between the EAJA, 28 U.S.C. § 2412(d), and the jurisdictional provision of the Social

Security Act, 42 U.S.C. § 405(g), both of which require a brief introduction. The EAJA's statute of limitations provides that a party seeking an award of fees and other expenses shall, "within thirty days of final judgment in the action," submit to the court its fee application "which shows that the party is the prevailing party . . . ." 28 U.S.C. § 2412(d)(1)(B). Under the Social Security Act, a claimant dissatisfied with the Secretary's administrative decision on a claim for benefits under the Act may seek district court review under 42 U.S.C. § 405(g). Under sentence four of § 405(g), the court may reverse or modify the Secretary's decision, and remand to the Secretary for further proceedings. A remand under sentence four is appealable by the Secretary under 28 U.S.C. § 1291. *Sullivan v. Finkelstein*, 496 U.S. 617 (1990).

A social security case may also be remanded under sentence six of 42 U.S.C. § 405(g), but that may occur only in two rare instances: when the Secretary requests a remand prior to filing her answer, or when the court finds that there was good cause for the claimant's failure to produce newly-discovered, material evidence. *Finkelstein*, 496 U.S. at 626-27. The Secretary may not appeal a sentence-six remand, *id.*, which does not rule on the "correctness of the administrative determination." *Melkonyan v. Sullivan*, 111 S. Ct. 2157, 2163 (1991). The district court is obligated, under sentence seven of § 405(g), to review the post-remand administrative proceedings conducted pursuant to a sentence-six remand.

The court of appeals below held that the EAJA's limitations period should not be triggered simply by the district court's remand issued pursuant to sentence four of 42 U.S.C. § 405(g), because respondent had not established his entitlement to benefits at that point. The same result has been reached by three other courts of appeals.[2]

We acknowledge, however, that this Court's opinion in *Melkonyan v. Sullivan*, 111 S. Ct. 2157, has created considerable

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[2] *Gray v. Sec'y of HHS*, ___ F.2d ___, 1993 WL 5546 (9th Cir. Jan. 19, 1993); *Labrie v. Sec'y of HHS*, 976 F.2d 779 (1st Cir. 1992); *Gutierrez v. Sullivan*, 953 F.2d 579 (10th Cir. 1992), *cert. pending*, No. 92-361. *But see Luna v. Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991).

confusion as to when an claimant who obtains a sentence-four remand must file his or her EAJA fee application. *Melkonyan* held that the term "final judgment" in the EAJA refers only to court orders and, therefore, decisions of administrative agencies may not trigger the limitations period. *Id.* at 2162. As to that holding there is no dispute. However, *Melkonyan* also suggested in dicta that a sentence-four remand, *when accompanied by a district court judgment*, may trigger the limitations period:

> In sentence-four cases, the filing period begins after the final judgment ("affirming, modifying or reversing") is entered by the district court and the appeal period has run, so that the judgment is no longer appealable. See [28 U.S.C.] § 2412(d)(2)(G).

Id. at 2165. In our view, nothing in *Melkonyan*'s dicta requires that a district court enter judgment simultaneous with its issuance of its sentence-four remand, in cases where the claimant's entitlement to benefits has yet to be determined. Moreover, even if the *Melkonyan* dicta were read to require that the district court enter a final judgment each time it issues a sentence-four remand, and that such a judgment trigger the limitations period, that dicta should be abandoned because it conflicts with the EAJA.

Seeking to capitalize on the *Melkonyan* dicta, the Secretary relies almost exclusively on 42 U.S.C. § 405(g), the statute that establishes the district court's jurisdiction over the merits of social security claims, to support her claim that EAJA applications in cases remanded under sentence four of § 405(g) must be filed shortly after the remand order is entered. But this case concerns the triggering of the *EAJA's* statute of limitations, not § 405(g), and, thus, the *only* question in this case is Congress' intent in drafting the EAJA's statute of limitations. As we now show, a review of the relevant provisions makes clear that Congress did not intend that a fee application be filed before the party seeking the fee has prevailed, which is the Secretary's position here.

B. The EAJA's Plain Terms Require Affirmance.

Under 28 U.S.C. § 2412(d)(1)(B), a fee application shall be filed "within thirty days of final judgment in the action."

Construing these words most naturally, a case is not "final" for fees purposes until it can be determined whether the claimant has prevailed. As we have noted, *Finkelstein* holds that a sentence-four remand is final for purposes of appeal by the government, but it should not govern the timing of fee applications by the claimant under the EAJA, as this Court itself indicated in *Finkelstein*. 496 U.S. at 628-30 & n.8; *see Hafner v. Sullivan*, 972 F.2d 249, 252 n.3 (8th Cir. 1992) ("As a matter of statutory construction and common sense, we see no reason why an appealable 'final judgment' under § 405(g) must necessarily be a 'final judgment' for purposes of § 2412(d)(1)(B)"). Because "finality" for fees purposes always requires that the applicant has prevailed, *Farrar v. Hobby*, 113 S. Ct. 566, 573 (1993), by using the term "final judgment" in the EAJA, Congress intended that any EAJA application be filed after the claimant has succeeded in his or her claims for benefits. *Accord* H.R. Rep. No. 120, pt. 1, 99th Cong., 1st Sess. 19 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 148 (where social security case is remanded for further proceedings, limitations period commences only after claimant prevails and district court enters post-remand judgment); *see Sullivan v. Hudson*, 490 U.S. 877, 887 (1989).

Other portions of the section containing the EAJA's statute of limitations also make abundantly clear that Congress intended fee applications to be filed only after the applicant has prevailed. Most importantly, 28 U.S.C. § 2412(d)(1)(B) requires that the application "show[ ] that the party is a prevailing party . . . ." Under prevailing party jurisprudence generally, a litigant has not prevailed simply by obtaining a favorable legal ruling. *Hewitt v. Helm*, 482 U.S. 755, 760-62 (1987). Thus, in the Social Security context, the claimant has not prevailed merely by obtaining a sentence-four remand. *Hudson*, 490 U.S. at 887. Rather, a claimant must obtain a finding of disability on remand in order to meet the prevailing party requirement, and cannot possibly make the showing required by the statute until that has occurred. Thus, Congress plainly contemplated that *any* party applying for an EAJA fee already would have already established his or her entitlement to the monetary benefits sought in the complaint. *See id.*; *see also White v. New Hampshire Dep't of Employment Security*, 455 U.S.

445, 452 (1982) (question of attorney's fees is "inquiry that cannot even commence until one party has 'prevailed' "). Indeed, it is not at all clear that a claimant ethically can make the necessary prevailing party allegation in a fee application filed before the remand proceedings take place, *i.e.*, when there is no arguable basis for maintaining that the claimant has won. *Cf.* Fed. R. Civ. P. 11.

The Secretary's response to the EAJA's requirement that the fee applicant "show that [he or she] is a prevailing party" is, at best, a non-sequitur. After having argued at length that a litigant may only prevail when he or she obtains an award of benefits (Sec'y Br. 25-27), the Secretary shifts ground, in an effort to explain away the statute's plain terms, and argues that a statement in the fee application that the claimant has obtained a remand is enough, for the meantime, to be deserving of prevailing party status under § 2412(d)(1)(B)(Sec'y Br. 28). Later, according to the Secretary, if the claimant *truly* prevails, "he will have satisfied the remaining element that is necessary for *full* prevailing party status" (*id.*) (emphasis added).

The notion of "partial" and "full" prevailing party status has no legal basis under any fee-shifting legislation, let alone the EAJA. In short, the Secretary's formulation does not, to put it most generously, comport with "the ordinary meaning of the words used" by Congress when it determined that the fee application must "show" that the applicant has prevailed. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Furthermore, in roughly 30% to 40% of all cases remanded to the Secretary by the district courts, claimants do *not* prevail on remand. *See* Social Security Admin., *Annual Report to Congress* 38 (Apr. 1992) (footnote to chart entitled "Civil Litigation in FY 1991"). Thus, under the Secretary's theory, a claimant can claim "partial" prevailing party status in a fee application filed with the district court, knowing that such status could be "lost" because of the claimant's failure, in fact, to prevail. To state such a fictional scenario is to refute it, and to belie any notion that Congress intended it.

The EAJA's further requirement that the applicant "allege that the position of the United States is not substantially justified[,]" 28 U.S.C. § 2412(d)(1)(B), also confirms that Congress

intended that the application be filed, if at all, after the claim to benefits has been fully resolved. As this Court has put it, "[t]he 'substantial justification' requirement of the EAJA establishes a clear threshold for determining a *prevailing party's* eligibility for fees . . . ." *Comm'r, INS v. Jean*, 496 U.S. 154, 165 (1990) (emphasis added). Thus, while the government can, in some cases, lose on the merits and still show that its position was reasonable, *Pierce v. Underwood,* 487 U.S. 552, 565 (1987), a finding that the government was unreasonable *presupposes* that the claimant has prevailed. Put another way, the issue in the EAJA portion of a social security case will be whether the "position of the United States" that the claimant was not disabled *was* a reasonable one. It defies reason to suggest, as does the Secretary (Sec'y Br. 28), that the substantial justification dispute should be joined prior to a determination as to whether the claimant is in fact disabled. While it is true that the substantial justification finding must be based on the record already made, *see* 28 U.S.C. § 2412(d)(2)(D), the necessary relationship between the prevailing party and substantial justification requirements underscores, once again, that Congress did not intend a filing at the time the Secretary contends is required.

C. The Decision of the Court of Appeals Makes Practical Sense.

The Eighth Circuit's decision here was based on its eminently reasonable prior ruling in *Welter v. Sullivan*, 941 F.2d 674 (1991), which fully considered *Melkonyan*. *Welter* held that the district court's sentence-four *remand* did not constitute the sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment after the remand proceedings had been completed (Pet. App. 5a-6a).[3]

Here, the district court did not issue a *judgment* when it ordered a remand, realizing that it ought to retain jurisdiction until after it was determined whether the claimant had prevailed, as *Sullivan v. Hudson* holds is appropriate. 490 U.S. at

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[3] The Eighth Circuit has reaffirmed *Welter* in *Hafner v. Sullivan*, 972 F.2d 249 (1992).

886-87. Rather, it simply remanded the case under sentence four of 42 U.S.C. § 405(g), but postponed entry of its judgment, and thus the running of the EAJA's statute of limitations, until after the administrative proceedings were completed. This is fully consistent with *Melkonyan*, which noted that, in order to trigger the statute of limitations, there must be a judgment "accompany[ing]" the post-remand order. 111 S. Ct. at 2165. Here, there was no judgment "accompanying" that order prior to the completion of the post-remand proceedings. *Accord Mendez v. Sullivan*, 792 F. Supp. 375, 378 (E.D. Pa. 1992).

By holding its judgment in abeyance until the post-remand proceedings were completed, the district court was able to effectuate *Hudson* — which held that claimants are eligible for EAJA fees for work done in post-remand proceedings. 490 U.S. 877. In other words, the court could determine whether the claimant had prevailed and, if so, whether he or she was entitled to fees for the post-remand proceedings. *See* Part I. D, *infra* (discussing post-remand *Hudson* fees in further detail); *accord Hafner*, 972 F.2d at 251. By contrast, the rule suggested by the Secretary makes no sense. In this case, for instance, the Secretary complains that respondent's EAJA application was filed more than a year after the district court's remand order (Sec'y Br. 18-19). But it is inconceivable that the claimant could have done anything else but wait for the completion of the post-remand proceedings, since he had not yet prevailed, at least as the law stood at that time, because he had not yet been awarded any benefits. *See Hudson*, 490 U.S. at 887 (citing circuit precedent, including from Eighth Circuit).[4]

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[4] We believe that the Eighth Circuit's ruling is consistent with the EAJA, prevailing party jurisprudence, and common sense. However, as we explained in our Opposition (at 14-18), if the *Melkonyan* dicta does in fact require the limitations period to be triggered by the remand order, the only sensible reading of *Melkonyan* is that achieving a sentence-four remand itself renders the claimant a prevailing party under EAJA, as a number of district court opinions have held in response to *Melkonyan*. *See, e.g., Thomas for Brown v. Sullivan*, 785 F. Supp. 788, 792 (C.D. Ill. 1992); *Rollins v. Sullivan*, 784 F. Supp. 253, 254, 258 (E.D. Pa. 1992); *Spurlock v. Sullivan*, 783 F. Supp. 474, 479 (N.D. Cal.), *reaff'd*, 790 F. Supp. 979 (N.D. Cal. 1992); *Mills v. Sullivan*, 782 F. Supp. 1347, 1349 (W.D. Mo. 1992); *Sesker v. Sullivan*, 779 F. Supp. (continued...)

Although the Secretary agrees that respondent had not prevailed at that point (Sec'y Br. 15-16), she argues, nevertheless, that the statute of limitations began to run when the remand order was entered. Thus, in the Secretary's view, respondent should have filed a "protective" EAJA application after the case was remanded and then awaited the completion of administrative proceedings. Then, when respondent prevailed on remand, the court could award attorney's fees (presumably after reviewing the remand proceedings). To put it bluntly, this scheme is absurd and, not surprisingly, finds very little support in the post-*Melkonyan* case law.[5]

When considered in the context of the thousands of social security cases filed every year, the Secretary's "file early and often" position would be unbelievably wasteful. It would require that, in *every* sentence-four case remanded for further proceedings, the claimant file a fee application before he or she knew the results of the post-remand proceedings. Courts would thus be inundated with fee applications, even though many of these claimants will not even prevail in the post-remand proceedings. If the claimant loses on remand before the Agency, there might be further judicial review of the merits of the action, and thus the fee application might never, or only well into the future, be considered. "Thus, the Secretary's position would require the claimant to file an anticipatory EAJA petition at a time when it either must be denied or indefinitely suspended — the ultimate in laying traps for the unwary and senselessly cluttering court dockets." *Hafner*, 972 F.2d at 251.

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[4](...continued)
1042, 1044 (W.D. Mo. 1991); *Audette v. Sec'y of HHS*, 776 F. Supp. 84, 91 (D.R.I. 1991); *Dow v. Sullivan*, 774 F. Supp. 46, 48-49 (D. Me. 1991).

[5] The Secretary claims support for the Agency's position in *Luna v. Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991), which did hold that a sentence-four remand triggers the limitations period. *See also Bertrand v. Sullivan*, 976 F.2d 977 (5th Cir. 1992). However, these issues are pending before the Fifth Circuit in *Lidy v. Sullivan*, No. 92-1035, in which, incredibly, the Secretary is taking a position at odds with the one taken here and in *Luna*, but consistent with the decision below — *i.e.*, that a remand reversing the Secretary's decision on an issue of law does *not* trigger the limitations period. Brief for Appellee [Secretary], at 5-7, No. 92-1035 (5th Cir. filed Apr. 15, 1992).

This cluttering of dockets is not mere conjecture because of the relationship of two factors. First, there is large volume of EAJA filings because attorneys whose clients have won sentence-four remands have an ethical obligation to file an EAJA application, if they believe there is a colorable claim that the government's position on the merits was not substantially justified. *See Taylor v. Heckler*, 608 F. Supp. 1255, 1259-61 (D.N.J. 1985). Generally speaking, under 42 U.S.C. § 406(b)(1), attorneys are entitled to a fee from their clients' benefits, not to exceed 25% of the past-due amount, under a contingent-fee arrangement in which the Secretary acts as the collection agent. *See Bowen v. Galbreath*, 485 U.S. 74 (1988). In this case, for instance, respondent's attorney was paid a contingent fee of $2,287.50 from respondent's past-due benefits (Pet. App. 9a). That attorney was also required to file an EAJA application in order to protect as much of the claimant's benefits as possible, because, if the EAJA fee were awarded, he would be required to return the smaller of the two fees to the claimant, as was ordered by the district court here (*id.*). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note).[6]

Second, the Secretary's insistence that an application must be filed prior to achieving prevailing party status, when combined with the strong ethical duty to seek EAJA fees, will result in hundreds of superfluous applications each year. In 1990 alone, 4,343 cases were remanded by the district courts for further administrative proceedings. *See Annual Report to Congress, supra*, at 38. In 38%, or 1,950 of those 4,343 cases, the claimant lost on remand, *id.*, which would make the EAJA

[6] No past due benefits may be withheld from claimants who prevail on SSI claims under Title XVI of the Social Security Act, 42 U.S.C. § 1381, *et seq.*, which is a disability and retirement program for poor people not entitled to regular social security benefits. *Bowen v. Galbreath*, 485 U.S. 74 (1988). For those cases, which constitute about 19% of all federal court Social Security Act cases, *see Annual Report to Congress, supra*, at 38, the EAJA provides the only significant inducement for legal representation. *See Galbreath*, 485 U.S. at 77 (citing "extreme financial need of SSI beneficiaries"). *See* Brief of *Amici Curiae* Legal Services of Northern California, Inc., *et al.* (hereafter "LSNC Br.") 28-30.

filing demanded by the Secretary in those cases utterly meaningless.

Nor should this Court underestimate the actual burden on the fee applicant and the court system that each such superfluous filing entails. An adequate EAJA application includes, at a minimum, the claimant's attorney's detailed contemporaneous time records, *see* 28 U.S.C. § 2412(d)(1)(B), an explanation of the compensable expenses incurred, *id.* § 2412(d)(2)(A), evidence of the relevant increase in the cost of living to establish the hourly rate requested, *id.*, evidence that the claimant is eligible for a fee under the EAJA's net worth limitation, *id.* § 2412(d)(2)(B), and a comprehensive brief explaining why the Secretary's administrative and litigation conduct was not substantially justified. *Id.* § 2412(d)(1)(B). The Secretary, of course, will be obligated to respond to these pleadings if she wishes to avoid fee liability, because she has the burden of proving substantial justification. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4989.

In practice, the Secretary not infrequently concedes a lack of substantial justification and EAJA claims are thus settled, sometimes before the application is filed. *Cf.* Admin. Office of the U.S. Courts, *1991 Annual Report of the Director* 121, Table 25 (over 92% of EAJA applications against Secretary granted). Such early settlements will not take place under the procedure demanded by the Secretary here because, at the time the claimant must file the fee application, the Secretary is still contesting the claimant's entitlement to benefits. And any eventual settlement would cost the Agency *more* under the Secretary's proposal, since the claimant would be entitled to a fee for preparing the "protective" application. *See Comm'r v. Jean*, 496 U.S. 154.

This insistence on the filing of a premature, potentially meaningless fee application is rendered all the more irrational by the fact that, if the claimant does prevail, a subsequent fee request will invariably be necessary. As we explain in more detail below (*infra* at 18-22), under *Sullivan v. Hudson*, 490 U.S. 877, a claimant is entitled to fees for work in post-remand administrative proceedings and, therefore, the claimant would need to update the application to add information about time

and expenses incurred on remand after prevailing before the Secretary. This two-tiered filing system is itself at odds with the EAJA's plain terms, which speak of "*an* application for fees," 28 U.S.C. § 2412(d)(1)(B) (emphasis added), not a protective application and then a final application. *See also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation").

Equally important, as we have noted (*see supra* at 14), attorneys are entitled to a contingent fee paid from the claimant's past-due benefits under 42 U.S.C. § 406(b)(1), which cannot, by definition, be calculated until the past-due benefits are known. That does not occur until after the remand proceedings are completed, and the Secretary has made the extremely complex calculations necessary to determine the past-due benefits. *See* 20 C.F.R. §§ 404.401 *et seq.*, 404.1918. Here, for instance, respondent received his past-due award letter, and then filed for fees under both § 406(b) and EAJA about a month later (Pet. App. 15a). But, according to the Secretary, respondent should have filed for EAJA fees well before he prevailed, although he could not have filed for § 406(b) fees until much later. Indeed, given the delays in administrative remand proceedings, the time between the two filings will generally be a year or more. *See Fergason v. Sullivan*, 771 F. Supp. 1008, 1013 (W.D. Mo. 1991) (average time between remand and final administrative decision on remand 13.9 months).

The Secretary maintains that the earlier, possibly superfluous EAJA filing is necessary so that EAJA claims are made "prompt[ly]" (Sec'y Br. 29). But that point is plainly specious, because, as the Secretary concedes (*id.* at 27), the court will be forced to wait until the administrative proceedings are over before it can determine whether the claimant has prevailed. Moreover, in the typical case, the court should, for efficiency purposes, consider the EAJA and § 406(b) applications at the same time so that it can calculate the set-off required by Pub L. 99-80, § 3, and direct that the claimant be refunded the lesser of the two awards. Thus, the premature filing of EAJA applications in sentence-four remand cases demanded by the Secretary would not further any legitimate governmental or judicial interest. To the contrary, because the government's filing

deadline is inconsistent with prevailing party jurisprudence, it will catch many claimants unaware. Such a result is at odds with Congress' stated desire that the term "final judgment" in the EAJA's statute of limitations should not be construed in an "overly technical" manner "as a trap for the unwary." *See* H.R. Rep. No. 120, pt. 2, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 156 n.26.

The government cites two concerns of its own, which add no force to its argument and actually underscore the strengths of respondent's position. First, the Secretary criticizes the Eighth Circuit's requirement that the claimant "report" the remand results to the court in order to seek a fee, or that the Secretary do so if she wants to trigger the limitations period. *See* Sec'y Br. 29. This criticism is more than a little ironic, since, under the Secretary's view of the EAJA, either the claimant or the government obviously would be required to "report" the remand results to the court, because there would be no other way to obtain a fee.

The Secretary also complains that the Eighth Circuit's rule promotes delay (Sec'y Br. 29), presumably because the limitations period could only be triggered by a post-remand judgment. As a practical matter, of course, the claimant will return to the district court promptly, "being hungry to see some cash," *McDonald v. Schweiker*, 726 F.2d 311, 314 (7th Cir. 1983), and we note that the government has never claimed that EAJA applications have been delayed as a general matter. The only real difference between the rules urged by the parties is that, under the government's view, voluminous fee applications will be pending for months, if not years, for no reason, and in fact may languish forever in cases in which the claimant does not prevail on remand.

However, even assuming that the potential for delay is a serious consideration, the *government's* procedure allows *more* opportunity for delay. Under it, there is no time by which the claimant must report to the court after winning on remand, because a "timely" fee application would have already been filed many months before the remand proceedings were completed. Indeed, the government could not even cut off the claimant's opportunity for a fee by obtaining a judgment, as it

clearly could after the post-remand decision under the Eighth Circuit's ruling. *See Tripodi v. Heckler*, 100 F.R.D. 736, 739 (E.D.N.Y. 1984). Thus, under the Secretary's approach, the claimant could wait forever after winning on remand and the Secretary would be helpless to create a time bar, except possibly by laches. *Id.; see White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 n.13 (1974) (*citing Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), where passage of several years between completion of merits and fee request "presented no bar to an award of fees").

In light of these serious practical considerations, absent clear statutory language mandating the result urged by the Secretary, the Court should not assume that Congress created such a preposterous scheme. Not only is that language lacking here, but there is, as we have noted, very strong evidence that Congress envisioned that fee applications would be filed only after the post-remand proceedings were completed, precisely as the Eighth Circuit held here. Thus, all doubts should be resolved against the Secretary's interpretation of the EAJA.

D. The Court of Appeals' Decision is Consistent with this Court's Decision in *Sullivan v. Hudson*, which the Secretary's Position Here Virtually Overrules.

In *Sullivan v. Hudson*, this Court held that work performed in post-remand administrative proceedings in social security cases is compensable under the EAJA because that work is necessary to the vindication of the claimant's rights. 490 U.S. at 885-90. In *Hudson*, the district court's remand did not occur because the Secretary requested a remand prior to filing her answer or because the district court found "good cause" for the taking of newly discovered "material" evidence (the only predicates for a sentence-six remand, the other type of remand under § 405(g)). Rather, the decision was reversed and remanded because the Secretary had ignored her own regulations and had failed to consider the cumulative effect of the claimant's disabilities (*id.* at 880-81) — a quintessential fourth-sentence remand. *See Labrie v. Sec'y of HHS*, 976 F.2d 779, 783 (1st Cir. 1992) (Secretary concedes *Hudson* involved sentence-four remand); Sec'y Br. 24 (same).

Despite the fact that *Hudson* was remanded under sentence four, this Court specifically noted that the district court had entered a post-remand judgment of dismissal. 490 U.S. at 881-82. The claimant then filed a fee application, which no one even intimated was untimely (even though it would have been under the government's latest theory), and this Court affirmed an award of fees, both for in-court work and for counsel's time before the Secretary on remand. With respect to the latter component, this Court held that the post-remand work was compensable because it was necessary "to the ultimate vindication of the claimant's rights . . .[,]" *id.* at 890, and repeatedly noted the district court's ability to retain jurisdiction in order to protect those rights. *Id.* at 886.

Thus, *Hudson* seeks to provide a fully compensatory fee when the Secretary's unreasonable conduct requires a claimant to endure further administrative proceedings. With that in mind, the Secretary's principal motivation in arguing that *Finkelstein* and *Melkonyan* prevent the district court from issuing a post-remand judgment in sentence-four cases is, in our view, clear. The Secretary believes that the court may not retain jurisdiction even to issue a post-remand judgment and, therefore, the claimant is not eligible for fees for post-remand work established by this Court in *Hudson* (Sec'y Br. 25). In other words, the Secretary maintains that *Hudson* fees are not available in sentence-four cases (*id.*). This argument turns *Hudson* on its head.

As we have explained, the rationale of *Hudson* is that representation in post-remand proceedings is necessary to the vindication of the claimant's rights under the Social Security Act. 490 U.S. at 890. Indeed, *Hudson* noted that, without the opportunity for such fees, some attorneys might abandon claimants once the court remanded the case. *Id.* Although most attorneys would not forsake their clients in light of their ethical responsibilities and the opportunity for a contingent fee under 42 U.S.C. § 406(b), *Hudson* recognized that *claimants* would be severely penalized if they could not recover EAJA fees for the post-remand administrative proceedings, because their lawyers would then be compensated solely out of the claimants' benefits. As the Court put it, "we find it difficult to ascribe to

Congress an intent to throw the Social Security claimant a lifeline it knew was a foot short." 490 U.S. at 890.

Given the logic of this Court's decision, there is no reason to believe that *Hudson* should apply only in sentence-six cases, *i.e.*, remands occurring prior to the Secretary's answer or because there is new and material evidence. Each of *Hudson*'s key rationales — the relationship between the remanding court and the administrative remand proceedings, the encouragement of representation, and the protection of the claimant's benefits through recovery of a full fee — apply with equal force in sentence-four and sentence-six cases.

Indeed, if anything, recovery of administrative remand fees makes *more* sense in many sentence-four cases. A court that orders a sentence-six remand "does not in any way rule as to the correctness of the administrative determination." *Melkonyan*, 111 S. Ct. at 2163. Frequently, a sentence-six remand occurs because the claimant wants to present information to the ALJ of which neither the claimant nor the Secretary was even aware when the Secretary's original decision was made. *Finkelstein*, 496 U.S. at 626. Thus, in many of those cases, the need for further administrative proceedings is not the Secretary's fault.

In a sentence-four case, however, a court's decision to reverse or modify the Secretary's decision *always* signifies that the Secretary has committed a legal error. In *Finkelstein*, for example, the sentence-four remand was part and parcel of the district court's effective invalidation of a federal regulation concerning eligibility for survivors' benefits. 496 U.S. at 624. Here, the district court's remand was necessary, among other things, to comply with the Eighth Circuit's controlling law on the evaluation of pain, which the ALJ's decision had violated (Pet App. 36a). Thus, here, as in any case remanded under sentence four, the court sent the case back to the Secretary with instructions to follow the legal precepts that she had previously breached, something which never occurs in a sentence-six case. In short, the fact that the claimant is required to endure the time and expense of further administrative proceedings in a sentence-four case results from the Secretary's wrongful acts,

and thus compensation for that time and expense precisely fulfills *Hudson*'s purposes.

The degree to which the Secretary's argument vitiates *Hudson* should not be underestimated. Although to our knowledge the Secretary does not keep statistics on how many cases are remanded under sentence four as opposed to sentence six, experience suggests that the vast majority of cases remanded under § 405(g) are remanded under sentence four. Sentence six is employed only in the rare instances that the Secretary agrees to a remand prior to answering the complaint or when the court finds that there is new and material evidence that, for good cause, was not produced previously. All other remand cases — virtually every case involving an erroneous administrative ruling by the Secretary — are sentence-four remands. *See Melkonyan*, 111 S. Ct. at 2164 (explaining narrow scope of sentence six). Based on our informal review of social security decisions, and undersigned counsel's experience, we estimate that more than 90% of all § 405(g) remands are under sentence four. *See also* LSNC Br. 23.

Moreover, the relatively few sentence-six cases that do exist are less likely than sentence-four cases to generate significant *Hudson* fees. First, as we have indicated, in sentence-six cases where the case is sent back to the Agency to consider newly discovered evidence, it is quite possible that the Secretary's position was reasonable, *i.e.*, substantially justified. Further, where the Secretary agrees to a remand prior to filing her answer, there will be very little attorney time expended at the district court level and it is at least possible, if not likely, that the Secretary's request for a remand was precipitated by a desire to settle the case on terms favorable to the claimant, so that the total compensable fee will be negligible. In short, the Secretary's position here would effectively overrule *Hudson*, in the guise of a technical statute of limitations ruling.

To be sure, despite the Secretary's insistence to the contrary, *Hudson* could be protected in sentence-four cases even if the Secretary's proposed filing deadline is adopted here. While that result would be preferable to the virtual annulment of *Hudson* that the Secretary has advanced, an explanation of how such a scheme would work serves only to further undermine the

Secretary's statute of limitations argument. Under the Secretary's view, the claimant would file his or her fee application, complete with time records, brief, and other necessary materials, shortly after the issuance of the sentence-four remand, and the Secretary would then respond. At that point, the court would hold the matter in abeyance indefinitely.

Thereafter, if the result on remand were favorable, the claimant would have to update the fee application, submitting evidence of the time and expenses incurred in the administrative proceedings (along with revised information on the relevant increase in the cost of living under 28 U.S.C. § 2412(d)(2)(A)). The claimant likely would want to present new argument on the "substantial justification" question, if the favorable decision on remand presented particularly cogent reasons for abandoning the Secretary's prior position (for instance, the ALJ may have embraced precisely the theory of disability argued by the claimant from the case's inception).

In short, a two-step filing requirement to preserve *Hudson* fees has no more support in the language, history, or purpose of the EAJA, than does the Secretary's position on the underlying statute of limitations question. This Court should thus reject that position and the Secretary's not-so-subtle invitation to eviscerate *Hudson*.

E. The Court of Appeals' Decision is Consistent with *Melkonyan*, *Finkelstein*, and Rule 58 of the Federal Rules of Civil Procedure.

As we noted at the outset of this brief, the Secretary's position in this case rests not on the terms of the EAJA, but on her reading of *Sullivan v. Finkelstein* and *Melkonyan v. Sullivan*. For the following reasons, the court of appeals' decision is consistent with those cases, and is reinforced by Rule 58 of the Federal Rules of Civil Procedure.

1. In *Melkonyan*, the Court noted that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable. See [28 U.S.C.] § 2412(d)(2)(G)." 111 S. Ct. at 2165. This Court's discussion of sentence-four cases was dicta,

however, because the parties had agreed, and the Court concurred, that Mr. Melkonyan's case had not been remanded under that sentence. *Id.* at 2163.

In evaluating the *Melkonyan* dicta, we must be careful to remember that it is the EAJA's limitations period, not § 405(g), that must be interpreted in this case. That provision states that a fee application is due "within thirty days of final judgment in the action . . . ." 28 U.S.C. § 2412(d)(1)(B). "Final judgment," in turn, is defined by the EAJA as "a judgment that is final and not appealable . . . ." *Id.* § 2412(d)(2)(G). Thus, under this section, as well as under the above-quoted *Melkonyan* dicta, the proper focus is on *when* a district court's judgment is no longer appealable. The answer to that question is contained in Rule 58 of the Federal Rules of Civil Procedure, as confirmed by Rule 4 of the Federal Rules of Appellate Procedure, which governs the time period for filing appeals from final decisions of the district courts.

Rule 58 provides in relevant part that "[e]very judgment *shall* be set forth in a separate document. A judgment is effective *only* when so set forth and when entered as provided in Rule 79(a)" (emphasis added).[7] Rule 4(a)(1) of the Federal Rules of Appellate Procedure establishes that, in cases in which the federal government is a party, either party has 60 days from entry of the judgment or order in which to file an appeal. Significantly, Rule 4(a)(7) states that "[a] judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79 of the Federal Rules of Civil Procedure." If there were any doubt that the requirement of Rules 58 is absolute, this Court has made clear that the Rule "must be mechanically applied in order to avoid . . . uncertainties as to the date on which judgment is entered." *U.S. v. Indrelunas*, 411 U.S. 216, 222 (1973).

Rule 4(a) thus confirms what the plain language of Rule 58 establishes — that in order to trigger the 60-day time period of Rule 4(a)(1), there is an absolute requirement that a document,

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[7] Rule 79(a) prescribes, among other things, the manner in which the Clerk must enter a judgment on the civil docket.

separate from the appealable order, be entered on the district court docket. It is undisputed that no judgment at all, let alone such a separate document, was entered here, and thus, in the words of EAJA § 2412(d)(2)(G) and *Melkonyan*, there exists no appropriate judgment that is final and *not appealable*. The district court's decision here — to hold its final judgment in abeyance until the court was notified of the result of the administrative proceedings — thus avoids the statute of limitations bar, and the absurdities that bar would create if claimants were required to file fee applications before they prevail on remand.

2. Moreover, the court of appeals' view is fully consistent with *Finkelstein*, 496 U.S. 617. The narrow ruling in *Finkelstein* — that a district court order remanding a case under the fourth sentence of the Social Security Act's jurisdictional provision, 42 U.S.C. § 405(g), is a "final decision" for purposes of appeal by the government under 28 U.S.C. § 1291 — does not speak to, let alone disturb, the deeply embedded understanding that, for attorney's fees purposes, a case is not final until the party seeking a fee has prevailed.

In *Finkelstein*, the claimant was a widow whom the Secretary had found not disabled under a regulation that requires individuals seeking disabled widows' benefits to have a so-called "listed impairment" as defined by the Secretary. *See* 20 C.F.R. Part 404, Subpart P, Appendix I (listing of specific medical conditions entitling an applicant to a finding of disability without further inquiry). The enabling legislation, however, required a finding of disability if the claimant is precluded "from engaging in any gainful activity." 42 U.S.C. § 423(d)(2)(B)(1989). The district court agreed with the Secretary that the claimant did not have a listed impairment, but nevertheless remanded the case for further findings as to her ability to engage in gainful activity, thus "essentially invalidat[ing], as inconsistent with the Social Security Act, the Secretary's regulation restricting" the benefits to those with a listed impairment. *Finkelstein*, 496 U.S. at 624. Rather than accept the remand, the Secretary sought an immediate appeal of this important issue of law, but the Third Circuit dismissed the appeal on the ground that the remand order was an interlocutory, non-appealable order under 28 U.S.C. § 1291.

The two most prominent features of the *Finkelstein* decision are its confined scope and its practical approach to the problem of obtaining appellate review of the particular type of district court order at issue there. Thus, the opinion begins by cautioning that it only addresses whether certain § 405(g) remand orders, not all remand orders, or even other orders under § 405(g), are appealable by the Secretary. *Finkelstein*, 496 U.S. at 623 & n.3. Moreover, the Court recognized that, if the Secretary issued a decision favorable to the claimant on remand, there might be no way for the Secretary to appeal the important adverse ruling of law included in the district court's decision. *Id.* at 625 ("there would be grave doubt . . . whether he could appeal his own order").

Textual support for the decision in *Finkelstein* came from the fourth sentence of § 405(g), which provides that the district court, in reviewing final administrative decisions of the Secretary, may enter a "judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). The use of the term "judgment," when coupled with the eighth sentence's declaration that such judgments "of the court shall be final," convinced the Court that "sentence four" judgments, including those ordering a remand, are appealable by the government under § 1291. *Finkelstein*, 496 U.S. at 625.

We agree with the court of appeals that the remand order here was issued under sentence four, and we believe that all sentence-four remand orders, such as the one issued here by the district court, are appealable by the Secretary under 28 U.S.C. § 1291. In other words, under *Finkelstein*, such orders are final as they apply to the Secretary within the meaning of sentence eight of 42 U.S.C. § 405(g), and thus may be appealed by the Secretary. *See Finkelstein*, 496 U.S. at 625. Moreover, we acknowledge, as the Secretary notes (Sec'y Br. 16 n.9), that simply because the district court here did not label its remand order a "judgment" does not mean that its order was not one under sentence-four, of which the Secretary may obtain appellate review, once a Rule 58 separate judgment is issued. *See Finkelstein*, 496 U.S. at 628 n.7.

Further, under *Finkelstein*, once a case is remanded under sentence four, the district court cedes most of its jurisdiction over the merits of the claim, at least temporarily, while the post-remand administrative proceedings are being conducted. *Id.* at 625. If the claimant does not win on remand, or achieves only partial success, *Finkelstein* indicates that the claimant must initiate a "separate piece of litigation," *id.*, in order to gain further merits review.[8]

Respondent and the Secretary agree on the foregoing discussion of *Finkelstein*, and thus the Secretary is simply wrong that respondent's position would "obliterate th[e] carefully drawn distinction between sentence four and sentence six remands" (Sec'y Br. 20). But those points of agreement do not resolve *this* case. Thus, that a sentence-four remand is appealable by the Secretary under § 1291, has no bearing on when a judgment is final and not appealable under the EAJA. Indeed, the Secretary's prominent reliance on *Finkelstein*'s § 405(g) jurisprudence illustrates precisely where its analysis has gone awry.

Finkelstein concerned whether *the Secretary* could appeal a sentence-four remand order, and insures that review is available to the Secretary under 28 U.S.C. § 1291, but does not address the district court's obligation to issue a judgment that triggers the appeal period, and certainly does not address whether such a judgment would trigger the EAJA's limitations period. In short, the sentence-four remand order is significant only because it constitutes a final decision that the government may

[8] *Finkelstein* does *not* require that a claimant who has failed to win on remand actually file a new civil action under sentence one of § 405(g) in order to obtain further merits review, rather than simply moving the district court to reopen the prior civil action. The latter resolution would make eminent sense, since the claimant would not be required to draft another complaint, pay another filing fee, and serve process again, the case would be returned to a judge or magistrate who is already familiar with the record, and the claimant would be assured that the case would not go to the bottom of the docket pile. All of these problems would arise if a new civil action were filed, which would make little sense since the "new piece of litigation" referred to in *Finkelstein* is the same case that was originally filed in the district court. *See* LSNC Br. 26-28.

appeal under § 1291, and it does not, standing alone, constitute a judgment within the meaning of Fed. R. Civ. P. 58 or Fed. R. App. P. 4(a). It does not, therefore, trigger the EAJA's limitations period, which is specifically dependent on the issuance of a Rule 58 judgment. *See McDonald v. Schweiker*, 726 F.2d 311, 313 (7th Cir. 1983) ("final judgment" is used 151 times in U.S. Code, with varying meanings).

Further, *Finkelstein* was very careful to limit its holding to appeals taken by *the Secretary*, as opposed to *the claimant*. 496 U.S. at 619, 623. The Court expressly reserved the question of whether "the person seeking judicial review may seek to appeal [a remand judgment] on the ground that broader relief should have been granted by the district court . . . ." *Id.* at 623 n.3. In doing so, the Court cited *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1987), *cert. denied*, 390 U.S. 964 (1968), where a claimant sought review in the court of appeals of a § 405(g) remand. The district court had remanded the case for further proceedings because the Secretary's original administrative decision had contained numerous legal errors. *Id.* at 284. In an opinion by then-Circuit Judge Blackmun, the Eighth Circuit held that a claimant may *not* appeal a § 405(g) remand, because such a remand does not finally end the case.

There is good reason to distinguish between governmental and claimant appeals under § 405(g). When the district court remands a case for further proceedings under sentence four and the Secretary finds the claimant disabled on remand, it is unlikely that the government would be able to appeal its own decision, thus possibly insulating the district court's legal ruling from appellate review. As we have noted, *Finkelstein* specifically cited this problem as support for its ruling. 496 U.S. at 625. A claimant, however, has no such problem, since he or she clearly can obtain further review of any adverse decision after remand. *See supra* note 8. Thus, as it applies to *a claimant*, a sentence-four remand is truly interlocutory — it arrives before the claimant's entitlement to benefits is established *and* it does not cut off his or her right to further review. As this Court has indicated on more than one occasion, "the requirement of finality [under § 1291] is to be given a 'practical rather than a technical construction.' " *Eisen v. Carlisle & Jacquelin*, 417 U.S.

156, 171 (1974) (*quoting Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949)). This functional approach counsels against the claimant's right to appeal a sentence-four remand prior to the remand proceedings, since it would promote piecemeal review, with no countervailing benefit. *See Eisen*, 417 U.S. at 171 (*citing Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

That *Finkelstein* does not establish the claimant's right to appeal a sentence-four remand is important here, because the EAJA permits only *claimants*, not the government, to seek fees, *see* 28 U.S.C. § 2412(d)(1)(A), and an EAJA "final judgment" is one that is "final and not appealable . . . ." *Id.* § 2412(d)(2)(G). If, as we maintain, a sentence-four remand for further proceedings is not appealable by a claimant, it clearly is not "final" under the EAJA. Indeed, the case would be "not appealable," and the limitations period would be triggered, only after the post-remand proceedings were resolved in the claimant's favor and the district court had issued a post-remand judgment of dismissal — precisely the procedure contemplated by the courts below.

3. The court of appeals' ruling is thus consistent with *Melkonyan, Finkelstein*, and the federal rules. In effect, the Eighth Circuit decision permits the district courts to hold its EAJA (*i.e.*, Rule 58) judgment in abeyance until it can be determined whether the claimant has prevailed, and avoids the filing of always premature, and frequently meaningless, EAJA applications. This ruling, now joined by three other circuits, in no way conflicts with the Secretary's opportunity for appellate review established in *Finkelstein*, which can be harmonized with the EAJA's statute of limitations in three different ways.

First, since *Finkelstein* guarantees the government the right to appeal a sentence-four remand, there is no harm in waiting until the benefits determination on remand is known, at which time a judgment can be issued, at the behest of either party, that would trigger both the EAJA filing period and the time period in which to take the appeal. The Secretary now claims that this request for a post-remand judgment is burdensome, but it is exactly what the government had been doing for the entire history of the Social Security Act, and what it told this

Court it would continue to do for fees purposes in *Finkelstein*. Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 496 U.S. 617 (No. 89-504).

Second, when the Secretary wishes to appeal a district court sentence-four remand order, a very rare occurrence in routine disability cases such as respondent's, the district court can issue a judgment after the filing of the Notice of Appeal, thus facilitating appellate review. *Cf.* Fed. R. App. P. 4(a)(2) (premature notice of appeal cured by subsequent entry of judgment).

Finally, if the Court believes that *Finkelstein* and *Melkonyan* require the district court to issue a Rule 58 judgment simultaneous with the issuance of every sentence-four remand order, which would trigger the time in which the Secretary has to appeal the merits, still that would not trigger the EAJA filing deadline. As we have explained (*supra* at 27-28), since that judgment does not activate the *claimant's* appeal deadline, it has no possible bearing on the running of the EAJA's statute of limitations. Moreover, the Secretary is simply wrong that the district court is without jurisdiction to enter a subsequent judgment that would trigger the fees filing deadline.

Assuming that the district court is divested of all of its jurisdiction on the merits when the court issues a remand for further proceedings under sentence four, the district court clearly retains jurisdiction to entertain the fee dispute. Indeed, under the Secretary's formulation, the claimant must invoke the court's jurisdiction by filing his or her application within 90 days of the sentence-four remand, wait until the results of the administrative hearing, and, if the result is favorable, then notify the court of the result.

Thereafter, the district court also has jurisdiction to award a fee in a case remanded under sentence four, and to issue a *judgment* on that award. Presumably, in the unlikely event that there is a dispute as to meaning of the fee award or as to payment, the district court could surely issue a further *judgment* clarifying or enforcing its prior orders. Our point here is only that the district court plainly has the power to act and to issue judgments, even after it has issued an appealable order (as they often do in contempt and enforcement proceedings *and* in

attorney fees proceedings). *See White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451-52 & n.14 (1974); *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Thus, *Finkelstein*, at most, temporarily cuts off the district court's jurisdiction in sentence-four remand cases on the underlying disability dispute.

Despite this considerable reservoir of jurisdiction that exists after the issuance of a sentence-four remand, the Secretary argues that the district court may not issue a post-remand judgment of the type that respondent asked for here. The Secretary does not explain why that is so, and as we demonstrated in Part I. A *supra*, Congress clearly contemplated the issuance of such a judgment. Indeed, prevailing party jurisprudence — which requires a material alteration in the relationship between the parties before a fee can be assessed — requires that an *enforceable judgment* post-date, or coincide with, the attainment of prevailing party status. *See Farrar*, 113 S. Ct. at 573. Under *Finkelstein*, that judgment would not further adjudicate the merits of the claimant's disability in sentence-four cases, but it would serve two critical purposes: the claimant would have an order to enforce his or her right to benefits established in the remand proceedings, *accord Farrar*, 113 S. Ct. at 573, and there would be a clear point for the running of the EAJA's filing deadline.

4. Even if this Court were to agree with the Secretary that a Rule 58 judgment must be issued at the same time as the sentence-four remand order, *and* that judgment triggers the EAJA's limitations period, that result would not make *respondent's* fee application untimely. As the Secretary concedes (Sec'y Br. 19 n.12), the district court here did not issue a separate judgment within the meaning of Rule 58 and, therefore, the filing period did not run with the entry of the remand order.

The Secretary's only response to this irrefutable point is that respondent waived the need for a Rule 58 judgment because he did not insist upon the issuance of a separate judgment after the district court issued its sentence-four remand (Sec'y Br. 19 n.12). This argument borders on the frivolous. Respondent did not request the issuance of a Rule 58 judgment because he did not seek to appeal the remand order and he did

not need a judgment in order to participate in the post-remand proceedings. Indeed, any request for a judgment and an award of attorney's fees at that time would have been met with the response required both in the Eighth Circuit and around the country — that such a request was premature. *See Hudson*, 490 U.S. at 887 (citing Eighth Circuit precedent). Quite plainly, it was up to the *Secretary*, not respondent, to try cut off respondent's EAJA rights by requesting issuance of a judgment.

Moreover, the case law is quite clear that, without the issuance of a Rule 58 judgment, an appeal filed more than 60 days after the entry of an appealable order, is premature, not untimely. *See, e.g., Indrelunas*, 411 U.S. at 219 (government's appeal timely almost two years after entry of appealable jury verdict); *Cloyd v. Richardson*, 510 F.2d 485 (6th Cir. 1975). Indeed, if failing to request entry of a final judgment constituted "waiver" of the literal terms of Rule 58, that Rule would be made meaningless, because, in virtually every case in which there was an appealable order, but no judgment, the party hoping to obtain a dismissal on the ground that the appeal was untimely could argue successfully that the separate judgment requirement had been "waived."

For all these reasons, respondent's fee application was timely and the decision of the court of appeals should be affirmed.

II. IF THIS COURT CONCURS WITH THE SECRETARY'S STATUTE OF LIMITATIONS ARGUMENT, THAT RULING SHOULD NOT BE APPLIED IN THIS CASE.

Even if this Court agrees with the Secretary's interpretation of the EAJA's statute of limitations, the Court's ruling should not be applied to respondent, under either the non-retroactivity doctrine established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), or under principles of equitable tolling. Respondent spent three and one-half years opposing the Secretary's concededly unreasonable resistance to his disability claim. Thereafter, respondent filed an application for less than $1,700 in attorney's fees at a point considered timely under all then-existing precedent and the Secretary's own policies, but he has been forced to litigate the timeliness issue all the way to this

Court. As respondent now shows, if there were ever a case in which these equitable doctrines ought to be applied to cushion the harshness of an unanticipated ruling, this is it.

1. Under *Chevron Oil*, 404 U.S. 97, a court may give prospective effect only to decisions that establish new rules of law or overrule clear past precedent, because retroactive application would be inequitable to the party before the court and others similarly situated. A review of the proceedings below and the relevant legal landscape show that retroactive application of a rule allowing a sentence-four remand to trigger the EAJA's limitations period "would be anomalous indeed." *Id.* at 107.

The district court's remand order was issued on April 4, 1989 (Pet. App. 26a). Ninety days later, or July 3, 1989 — the date by which the Secretary claims respondent should have filed his fee application — was less than a month after this Court's June 12, 1989 decision in *Hudson*, which made clear that fee applications should post-date the administrative decision on remand. 490 U.S. at 887.

On January 31, 1990, an ALJ found respondent to be disabled, and the Appeals Council did not review that ruling (Pet. App. 10a). An award certificate, determining the amount of benefits due respondent, was issued on June 12, 1990 (*id.*). Shortly thereafter, on July 17, 1990, respondent moved for entry of a final judgment and filed his EAJA application (*id.*). At no time prior to that point did the legal terrain portend that a sentence-four remand issued before a finding of disability could possibly trigger the filing deadline.. The law nationwide, including in the Eighth Circuit, was that the fee application could only be filed after the remand proceedings had been completed. *See, e.g., Gamber v. Bowen*, 823 F.2d 242, 244 (8th Cir. 1987); *see also Brown v. Sec'y of HHS*, 747 F.2d 878, 884 (3rd Cir. 1984) (in EAJA case, court relied on the Secretary's promise that the Agency would, as a matter of policy, "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits") (emphasis in original).

The Secretary's position also remained constant, recognizing that the law required the government, "at least for purposes of

awarding attorney's fees" under the EAJA, to return to the district court, for a post-remand judgment to trigger the EAJA's filing period. Secretary's Reply Brief at 12, *Sullivan v. Hudson*, 490 U.S. 877 (No. 88-616). Even in *Finkelstein* — where the Secretary argued in favor of exactly the sentence-four/sentence-six distinction that she now claims mandates a reversal here, and which post-dated *Hudson* by about a year — the government remained true to its prior position:

> Of course, it is appropriate for the Secretary to file *any* new decision awarding benefits with the court so that the court can consider whether attorney's fees should be awarded under the EAJA.

Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 496 U.S. 617 (No. 89-504) (emphasis added). It was not until *Melkonyan* was decided on June 10, 1991 that anyone could have conceivably thought — based on *Melkonyan*'s sentence-four dicta — that a fee application in a sentence-four case had to be filed shortly after the remand.

Elsewhere the Secretary has taken, and still takes, the position that a Social Security claimant has the absolute right after the post-remand decision to return to the district court on the merits and therefore, presumably, for attorney's fees as well. 54 Fed. Reg. 37,789, 37,791 (1989). Furthermore, the forms *currently* used by the Secretary to inform claimants of ALJ decisions on remand tell claimants that they have the right to return to the district court and that "we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court" (*infra* App. 2a).[9]

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[9] Responding in part to these misleading forms, the Secretary assured this Court in *Melkonyan* that the Agency's practices would be changed to conform to the Court's decision, which was issued on June 10, 1991. Secretary's Brief at 31 n.26, *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (No. 90-5538). However, the form contained in the appendix hereto was issued on May 29, 1992 to a claimant who had won a sentence-four remand. Moreover, on January 15, 1993, the Secretary's Office of Civil Actions sent respondent copies of the same forms attached to petitioner's brief in *Melkonyan* (which contain the (continued...)

With this background in mind, we turn to the first of three *Chevron Oil* factors — whether the decision below established a new principle of law, either because it overruled clear past precedent or because it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 107. In applying this factor, we look to the law at the time that the underlying conduct, or the failure to act, took place. *Id.* at 106-09. There can be no question that, when the relevant event took place approximately two years before *Melkonyan* was decided — when respondent "failed" in 1989 to divine the need to file his fee petition within 90 days of the issuance of the sentence-four remand — the law unequivocally required the Secretary to return to the district court *after* remand to report the results of the proceeding, and thereby either continue or dismiss the pending civil action. Under the EAJA, it was equally clear that a final judgment from the district court after remand was necessary to trigger the 30-day limitations period, as the Secretary expressly told this Court in *Finkelstein*, and as the Court itself had indicated in *Hudson*. 490 U.S. at 887.

But perhaps the best evidence that, in July 1989, just after *Hudson* was decided, respondent could not have foreseen the necessity of filing his fee application *before he won his right to benefits* is the experience of social security claimants and their attorneys generally. The voluminous number of EAJA cases leading up the grant of certiorari here, reveal dozens, if not hundreds, of fee applicants caught unaware by the Secretary's new-found timeliness argument, and we know of none who anticipated it. The very fact that the government changed its own arguments *in this case* in mid-streám — at first adopting the Ninth Circuit's ruling in *Melkonyan*, and then moving to its current position — speaks volumes as to whether its stance was foreshadowed. Thus, a reversal of the decision below would establish a new principle of law, "by overruling clear past

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[9](...continued)
same offending language as is quoted in the text), *see* Petitioner's Brief at 2a, 4a, *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (No. 90-5538), and informed respondent that those forms are the ones currently in use.

precedent on which litigants may have relied." *Chevron Oil*, 404 U.S. at 106.

Next, given the prior history of the 30-day rule and its purpose and effect, retroactive application of a new rule would plainly retard the purposes of the law. *Id.* at 106-07. In short, retroactive application would be inconsistent with the basic purpose of the EAJA: to make the government bear the expense of its unreasonable conduct. *Comm'r v. Jean*, 496 U.S. at 162-65 & nn.11-14. Further, retroactive application would be the very "trap for the unwary resulting in the unwarranted denial of fees" that Congress sought to eliminate in its 1985 EAJA amendments. H.R. Rep. No. 120, pt. 2, *supra* at 6 n.26.

Finally, retroactive application would produce substantially inequitable results, *Chevron Oil*, 404 U.S. at 107, as the facts of this case illustrate. Petitioner's counsel below, a small firm practitioner in Anoka, Minnesota, took this case on a contingent fee basis. After pursuing his client's claim for several years, and after the Secretary failed to file the administrative decision with the district court, counsel moved for entry of a final judgment and EAJA fees at a point considered timely under a settled nationwide practice. To deny respondent the right to recoup the fee that he has already paid his attorney "would surely be inimical to the beneficent purpose of the Congress." *Chevron Oil*, 404 U.S. at 108.

In addition, retroactive application also would be unjust to hundreds of other claimants and their lawyers who would suffer from reversal here. Attorneys with pending EAJA applications relied on settled law and should not be penalized for doing so. More fundamentally, claimants would be damaged severely because, although their attorneys could still obtain a fee in many cases, such as this one, from *the claimants'* past-due benefits under 42 U.S.C. § 406(b)(1), a reversal here would, if applied retroactively, negate any possibility of an EAJA fee, thus forcing claimants to suffer substantial losses of needed disability benefits. *See Watson v. Sullivan*, 735 F. Supp. 971 (D. Ore. 1990) (government urges retroactive application of Ninth Circuit's ruling in *Melkonyan* that would result in loss of more than $7,000 in past-due benefits). As Judge Pollak has put it, "it is difficult to believe that . . . the Supreme Court would have

ordered retroactive application of its newly announced rule [in *Melkonyan*], because such a decision would have left without a remedy a large number of Social Security claimants who had relied on existing law." *Rollins v. Sullivan*, 784 F. Supp. 253, 258 (E.D. Pa. 1992) (footnote omitted).

Thus, if this Court reverses, it should give its ruling prospective effect only because, as in *Chevron Oil*, the "equities require[] nonretroactive application of the . . . statute of limitations here." 404 U.S. at 109.[10]

2. Aside from whether *Chevron Oil* requires prospective-only application, the filing period should be equitably tolled, as it was in *Luna v. Dep't of HHS*, 948 F.2d 169, 172-73 (5th Cir. 1991). Noting that *Luna* tolled the limitations period because the district court's remand order purported to retain jurisdiction, the Secretary argues that this case is not comparable (Sec'y Br. 21 n.14). While we agree with the Secretary that *Luna*'s tolling analysis incorrectly focussed on § 405(g) rather that the EAJA's statute of limitations (*id.*), the situation here is factually quite similar to *Luna*. Since the district court here did not enter judgment, but simply denied *both* parties' motions

[10] The majority of courts that have considered the issue have applied *Melkonyan*'s sentence-four dicta prospectively only. *See, e.g., Sargent v. Sullivan*, 1991 WL 160091 (4th Cir. Aug. 22, 1991) (unpublished); *DeFrancesco v. Sullivan*, 803 F. Supp. 1332, 1335-36 (N.D. Ill. 1992) (noting near-universal rejection of Secretary's approach, and refusing to apply it retroactively); *Carrol v. Sullivan*, 802 F. Supp. 295, 300-04 & n.6 (C.D. Cal. 1992) (noting that "clear majority" of courts have refused to apply Secretary's interpretation retroactively) (alternative holding); *Lindner v. Sullivan*, 799 F. Supp. 888, 891 (N.D. Ill. 1992); *Mendez v. Sullivan*, 792 F. Supp. 375, 378 n.2 (E.D. Pa. 1992) (alternative holding); *Green v. Sullivan*, 788 F. Supp. 275, 276-78 (W.D. Va. 1992); *Sansano v. Sullivan*, 788 F. Supp. 218, 222-25 (D.N.J. 1992); *Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438-41 (D.N.J. 1992); *Thomas for Brown*, 785 F. Supp. at 791-93; *Rollins*, 784 F. Supp. at 256-58; *Lopez v. Sullivan*, 780 F. Supp. 496, 504 (N.D. Ill. 1991); *Santiago v. Sullivan*, 783 F. Supp. 223, 225-26 (E.D. Pa. 1992); *Sykes v. Sullivan*, 779 F. Supp. 29, 31 (E.D. Pa. 1991); *Butts v. Bowen*, 775 F. Supp. 1167, 1171-72 (N.D. Ill.), *reaff'd*, 778 F. Supp. 453, 453-54 (N.D. Ill. 1981); *see also Myers v. Sullivan*, 916 F.2d 659, 677-78, 679 n.20 (11th Cir. 1990) (assuming correctness of Secretary's posision, while noting its inconsistency with *Hudson*, and holding *Finkelstein* should not be applied retroactively to EAJA timeliness issues).

for summary judgment (Pet. App. 27a), the court evinced an obvious intent to retain jurisdiction (which made sense, since that was the law at the time the district court's remand order was issued), which is sufficient to toll the limitations period.[11]

But it is the *Secretary's* actions that are most troubling. The government promised in *Brown*, *supra*, that it would return to the court in *every* remanded case for entry of judgment, so that EAJA applications could be considered in an orderly fashion. The Secretary issued regulatory commentary to the same effect. 54 Fed. Reg. at 37,791 (claimants have absolute right to return to court after administrative decision on remand); *see also infra* App. 2a. It defies reason to suggest, as the Secretary does here, that respondent should be denied a fee after having taken actions that conform precisely with the Agency's own directives. As this Court has put it, equitable tolling is appropriate where "the complainant has been induced . . . by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 458 (1990). Here, where the Secretary has repeatedly promised to return to the district court after the entry of *any* post-remand order to allow the filing of fee applications, as well as to permit further review on the merits, there is more than sufficient reason to toll the statute of limitations.[12]

3. Not surprisingly, the Secretary's brief avoids any discussion of the fairness of holding respondent to a time limit

[11] Indeed, contrary to her statement here, the Secretary conceded in her court of appeals brief that the district court evinced an intent to retain jurisdiction. Reply Br. for Appellant [Secretary] at 4, No. 91-3494MNST (8th Cir. filed Mar. 24, 1992).

[12] *See also Bodner v. Sullivan*, 804 F. Supp. 23, 33 (N.D. Cal. 1992) (concurring with decision below, but ruling alternatively on tolling grounds); *Boronat v. Sullivan*, 788 F. Supp. 557, 561 (S.D. Fla. 1992) (equitable tolling); *Misciagno v. Sec'y of HHS*, 786 F. Supp. 1120, 1126 (E.D.N.Y. 1992) (relieving claimant from sentence-four judgment on account of surprise, inadvertence, or excusable neglect); *Ground v. Sullivan*, 785 F. Supp. 1407, 1410 & nn.2 & 3 (S.D. Cal. 1992) (declaring prior judgment null and void, thus establishing timeliness of claimant's application); *Robinson v. Sullivan*, 783 F. Supp. 245, 248 (E.D.N.C. 1991).

neither the Secretary nor any private party could have predicted, and instead presents a grab-bag of arguments as to why respondent's equitable arguments should not be reached. None of those arguments has merit.

First, the Secretary complains that respondent did not raise the *Chevron Oil* or tolling arguments in the court of appeals (Sec'y Br. 21 n.14, 30 n.18). Respondent can hardly be faulted for that supposed failure, since at the time he filed his appellate brief, the Eighth Circuit had decided *Welter v. Sullivan*, 941 F.2d 674, which even the Secretary conceded was controlling and would require a ruling in respondent's favor. *See* Reply Br. for Appellant [Secretary], at 2, No. 91-3494MNST (8th Cir. filed Mar. 24, 1992); Pet. App. 2a (noting Secretary's concession). In addition, both the *Chevron Oil* and equitable tolling arguments were briefed extensively by *amicus* Mid-Minnesota Legal Assistance, whose appearance for the purpose of addressing those issues was specifically consented to by the Secretary, *see* Consent to Mem. in Support of Motion to File Brief as Amicus Curiae, No. 91-3494MNST (8th Cir. filed Feb. 21, 1992), and the Secretary replied at length to those arguments. *See* Reply Br. for Appellant [Secretary], at 8-18, No. 91-3494MNST (8th Cir. filed Mar. 24, 1992). In light of these facts, the Secretary's waiver argument is fanciful at best.

Next, the Secretary maintains that the 30-day filing period is a jurisdictional bar, like the one present in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981), which precludes the Court from considering a non-retroactive ruling. To the contrary, the provision here, 28 U.S.C. § 2412(d)(1)(B), is not jurisdictional; it is worded virtually identically to 42 U.S.C. § 2000e-16(c), the statute of limitations considered in *Irwin v. Veterans Admin.*, 111 S. Ct. 453. There, the Court held, as a general matter, that once Congress has waived the government's immunity, equitable principles apply to the same extent as in a suit among private parties, and that, therefore, statutes of limitations in actions against the government are not jurisdictional. *Id.* at 457. Accordingly, because the EAJA is a waiver of the federal government's immunity to fees and litigation expenses, its 30-day filing period is not jurisdictional, and ordinary retroactivity principles control.[13]

We expect the Secretary to rely on what it has termed "legislative history" that indicates that the 30-day period is jurisdictional. The committee report cited by the Secretary below, however, S. Rep. No. 856, 98th Cong., 2d Sess. 16 (1984), was prepared for a version of the EAJA that was *vetoed* by the President. *Cf. Finkelstein*, 496 U.S. at 631 (Scalia, J., concurring). The inherent unreliability of such a report is underscored here because there is much more in-depth legislative history accompanying the bill that actually became law that *excludes* the earlier language concerning the purportedly jurisdictional nature of the limitations period. *See* H.R. Rep. No. 120, pt. 1, *supra* at 19-20; H.R. Rep. No. 120, pt. 2, *supra*, at 6 & n.26. It would have been anomalous for Congress to have made the filing deadline strictly jurisdictional, while at the same time urging that it not be construed in an "overly technical" manner as a "trap for the unwary," *id.*, which succinctly describes the snare that has been set for claimants by the Secretary's filing deadline. In any event, a snippet in a committee report — even it had accompanied the bill that was enacted — cannot overcome this Court's decision in *Irwin*. *See West Virginia University Hospitals v. Casey*, 111 S. Ct. 1138, 1147 (1991).

We also expect the Secretary to argue, as she did below, that *Chevron Oil* analysis may not be conducted because, under the patchwork decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), a ruling concerning the filing of fee applications in sentence-four cases cannot be applied prospectively here, if had already been applied retroactively in *Melkonyan*. 111 S. Ct. at 2448 (opinion of Souter, J.) (referring to requirement of "pure prospectivity"). However, the rule at issue here — the timing of fee applications in sentence-four remand cases — was not applied in *Melkonyan*, as both the

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[13] *See Bacon*, 786 F. Supp. at 438 (EAJA's filing period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991) (same); *see also Sansano*, 788 F. Supp. at 225 (rejecting Secretary's reliance on *Firestone*); *Rollins*, 784 F. Supp. at 256 (same).

parties and the Court agreed that the case there did not involve a sentence-four remand. 111 S. Ct. at 2163. *See, e.g., DeFrancesco v. Sullivan*, 803 F. Supp. 1332, 1335 n.4 (N.D. Ill. 1992) (*Beam* does not bar non-retroactive application); *Rollins*, 784 F. Supp. at 257-58 (same); *see also* Supplemental Report and Recommendation re Motion for Fees Under the EAJA (July 13, 1992), *Melkonyan v. Dep't of HHS*, No. CV-4317-MRP(K)(on remand from this Court: finding that case had been remanded under sentence six).[14]

The Secretary further maintains that respondent's equitable arguments should be ignored because the statute of limitations question here will affect only a diminishing number of cases that is dwindling out as the decision in *Melkonyan* becomes more distant in time. That is incorrect on its own terms because, if the Secretary prevails here, hundreds, if not thousands, of post-*Melkonyan* applicants would be trapped by the new ruling in the great majority of jurisdictions that have refused to accept the Secretary's interpretation of *Melkonyan*. In any event, the Secretary's position would render non-retroactivity analysis meaningless, since in any case where prospective-only application is urged, once the new rule is established, only those who had reason to follow the old rule will be caught unaware, a class which, by definition, will diminish over time.

Finally, the Secretary maintains that this Court should remand the retroactivity issue to the Eighth Circuit if it is worthy of consideration. While this would still allow respondent the opportunity to obtain the fée he deserves, it would also require further delay and is wholly unnecessary in light of the full discussion of the relevant legal principles here. Moreover,

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[14] *Beam* does not have any bearing on respondent's equitable tolling claim. Moreover, because *Beam* did not reach any true consensus (the "pure prospectivity" holding is gleaned from the widely disparate rationales of five Justices, in three entirely separate opinions), the full reach of *Beam* is unclear. *See DeFrancesco*, 803 F. Supp. at 1335 n.4. This is especially true here, because in the Term prior to *Beam*, eight members of this Court indicated that *Chevron Oil* applied fully to the proposed non-retroactive application of statutes of limitations. *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 178 (1990) (plurality opinion); *id.* at 221-23 (dissenting opinion of Stevens, J.).

the suggestion of a remand is at odds with *Beam*, whose "*pure* prospectivity" can be better achieved by a Supreme Court decision rather than a decision of a regional court of appeals.

* * *

The foregoing discussion amply demonstrates the unfairness of holding respondent to a statute of limitations that was unfathomable at the time he filed his fee application. However, the Court can properly avoid reaching respondent's equitable claims, by rejecting outright the Secretary's interpretation of the EAJA's statute of limitations, which has no basis in the statute, and would lead to the filing of premature and meaningless fee applications, a result that Congress did not intend.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 18, 1993

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

SSN: [omitted]

[Claimaint's name
[and address omitted]

Date mailed: MAY 29 1992

[Attorney's name
[and address omitted]

NOTICE OF ADMINISTRATIVE
LAW JUDGE DECISION
PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.0. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council will assume that you received the notice within five days after the date at the top of this notice unless you show you did not receive it within the five-day period.
- If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this

notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.
- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.
- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.
- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.
- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.
- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review the decision on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

Replaces Form HA-L99-U6

No. 92-311

In the Supreme Court of the United States

OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

RICHARD H. SCHAEFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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RICHARD H. SCHAEFER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent's brief fails to analyze the language of the two statutes that control this case: Section 2412(d) of the Equal Access to Justice Act (EAJA), and Section 205(g) of the Social Security Act, 42 U.S.C. 405(g). Respondent first asserts (Br. 8) that this case is *only* about Section 2412(d) of the EAJA. That provision gauges the time for filing a fee application under the EAJA on the entry of a "final judgment" in any "civil action" for which the United States may be liable for its opponent's attorney's fees. 28 U.S.C. 2412(d)(1)(B). The EAJA goes on specifically to define what constitutes a "final judgment" in the "civil action": A judgment that is final and not appealable. 28 U.S.C. 2412(d)(2)(G). Thus, the plain language of Section 2412(d) makes clear that the obligation to file a fee

application depends on the existence of a judgment in a civil action that is no longer appealable.

This case accordingly cannot be resolved solely by reference to the EAJA. In fact, as this Court held in *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157 (1991)—another case dealing with Section 2412(d) in the context of a Social Security case—Section 405(g) is central to a proper resolution of this case. That is because the "civil action" that forms the basis for respondent's fee request was adjudicated under Section 405(g), and it is the "final judgment" in that civil action that triggers the EAJA filing period. This Court has already established that the "final judgment" in the type of civil action at issue here occurs when the case is remanded to the Secretary pursuant to sentence four of Section 405(g). *Sullivan* v. *Finkelstein*, 496 U.S. 617 (1990). As this Court observed in *Melkonyan*, it necessarily follows that "[i]n sentence four cases, the filing period [for EAJA applications] begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165. Respondent offers no persuasive reason to retreat from this statement in *Melkonyan*—which directly and unambiguously prescribes the answer to the question presented in this case.

1. Respondent's position comes down to the argument that Section 405(g) authorizes a district court in a sentence four case to remand the case to the Secretary while retaining jurisdiction to enter a final judgment after proceedings on remand have been completed. Resp. Br. 8, 11. If a district court cannot do this, respondent's position cannot possibly be squared with the language of the EAJA, because the 30-day filing period is unambiguously triggered by the entry of a judgment that is final and not appealable.

In *Melkonyan*, the Court concluded that Section 405(g) does not permit such hybrid remand orders:

> [I]n *Finkelstein* we analyzed § 405(g) sentence-by-sentence and identified two kinds of possible remands under the statute. While we did not state explicitly at that time that these were the *only* kinds of remands permitted under the statute, we do so today. * * * Congress' explicit delineation in § 405(g) regarding the circumstances under which remands are authorized leads us to conclude that it intended to limit the district court's authority to enter remand orders to these two types.

111 S. Ct. at 2164 (footnote omitted). "This reading of the statute," the Court stated, "is dictated by the plain language of § 405(g) and is supported by the legislative history." *Ibid.*[1]

[1] Respondent asserts (Br. 8) that we are "[s]eeking to capitalize on *Melkonyan*['s] dicta," but it is he who is seeking to evade *Melkonyan*'s holding. Although part of the holding of that case was of course that the EAJA filing period can be triggered only by the judgment of a court, see 111 S. Ct. at 2161-2162, the Court went on to state that it "must decide" whether either party was entitled to return to district court to obtain a judgment that would start the EAJA clock ticking. *Id.* at 2163. The Court ultimately determined that it was unclear whether the remand in that case was pursuant to sentence six, or whether the suit ended as the result of a voluntary dismissal under Fed. R. Civ. P. 41(a); the Court accordingly remanded for the lower courts to make that determination. 111 S. Ct. at 2165. The Court held, however, that if the remand was pursuant to sentence six, the Secretary was obliged to return to district court and the court could enter judgment at that time. *Ibid.* If the case "was not a sentence six remand," however, the Court noted that the plaintiff "would not be entitled to fees." *Id.* at 2166. Thus, there is no basis for respondent's assertion that the Court's discussion of the types of remand available in Section 405(g) actions was purely dictum; on the contrary, the discussion on which we rely was necessary to the Court's ultimate resolution of the case, and to its instructions to the lower courts regarding how the case should be resolved on remand.

Respondent nonetheless argues (Br. 11) that a district court can avoid the clear import of *Melkonyan* by remanding a case pursuant to sentence four without entering judgment in the case at the time of the remand. Respondent endorses (Br. 11) the Eighth Circuit's fiction that district courts remanding cases pursuant to sentence four implicitly intend to retain jurisdiction to enter a final judgment after the proceedings on remand are completed. Pet. App. 5a-6a. Putting aside the fact that there is no evidence of that intent here,[2] the notion that district courts have the *authority* to do so is squarely inconsistent both with the terms of Section 405(g) and with *Melkonyan* and *Finkelstein*.[3]

In *Melkonyan*, the Court unambiguously stated "that the District Court's remand authority is confined to those circumstances specifically defined in § 405(g)." 111 S. Ct. at 2165. The Court went on to state that "remand orders [in Section 405(g) cases] *must* either accompany a final judgment * * * in accordance with sentence four, or

[2] When the district court entered its April 4, 1989, order remanding respondent's case to the agency, it did not express any intention of retaining jurisdiction over the case. On the contrary, it marked the case "closed" on its docket sheet. See Pet. Br. 16-17 & n.11. Contrary to respondent's claim (Br. 37 n.11), the Secretary did not concede in the court of appeals that the district court evinced an intent to retain jurisdiction when it remanded respondent's case in 1989. What the Secretary said was that the district court's August 26, 1991, order (Pet. App. 9a-12a) finding jurisdiction and awarding fees in the wake of *Welter* v. *Sullivan*, 941 F.2d 674 (8th Cir. 1991) (*reprinted at* Pet. App. 3a-8a), endorsed the Eighth Circuit's legal fiction that district courts remanding pursuant to sentence four automatically intend to retain jurisdiction. See Gov't C.A. Reply Br. 4.

[3] As we noted in our opening brief (Pet. Br. 17 n.11), the Eighth Circuit's rule—that in every sentence four remand case the district court intends to retain jurisdiction to enter a judgment after proceedings on remand are completed—would mean that no sentence four remand could ever constitute an appealable final judgment, a result directly contrary to this Court's decision in *Finkelstein*.

conform with the requirements outlined by Congress in sentence six." *Ibid.* (emphasis added). Moreover, *Finkelstein* also makes clear that the language of Section 405(g) means what it says, and that sentence four therefore does not authorize a remand apart from the entry of judgment. There, the Court stated that sentence four "*directs* the entry of a final, appealable judgment even though that judgment may be accompanied by a remand order." 496 U.S. at 629 (emphasis added). The Court accordingly made clear that the *sine qua non* of district court action pursuant to sentence four is the entry of a judgment. *Ibid.* The plain language of the statute, along with this Court's decisions in *Finkelstein* and *Melkonyan*, all confirm that respondent has matters exactly backwards: Although sentence four gives district courts the *option* of remanding in addition to entering judgment, it does *not* give district courts the converse option—that of remanding *without* entering a final, appealable judgment.[4]

[4] Respondent (Br. 19) and his *amici* (Nat'l Org. of Social Security Claimants Br. 14-19; Legal Services of No. California, *et al.* Br. 14-19, 22-30) contend that our position in this case is driven by a desire to overrule this Court's decision in *Sullivan* v. *Hudson*, 490 U.S. 877 (1989). They are mistaken. We do not believe that *Hudson* must be overruled for us to prevail here. As we argued in our opening brief (Pet. Br. 22-25), however, we do believe that this Court's decisions in *Finkelstein* and *Melkonyan* have limited the reach of *Hudson* to sentence six cases. The holding of *Hudson* applied "where a court orders a remand to the Secretary * * * and retains continuing jurisdiction over the case pending a decision from the Secretary which will determine the claimant's entitlement to benefits." 490 U.S. at 892. When *Hudson* was decided, neither this Court nor the lower courts had yet focused on the statutory distinction between sentence four and sentence six cases. *Finkelstein* and *Melkonyan* have since established, however, that the statute authorizes the district court to retain jurisdiction in the manner contemplated by *Hudson* only in sentence six cases, and we therefore submit that *Hudson* has been so limited. Respondent argues that it would "vitiate[]" *Hudson* to limit it to the "rare instances" in which cases are remanded pursuant to sentence six,

2. Respondent argues (Br. 7-8) that all this makes no difference, because the issue in this case is whether a remand order in a sentence four case is a "final judgment" for purposes of Section 2412(d)(1)(B) of the EAJA. He argues that it is irrelevant, for purposes of the EAJA, whether the remand order was a judgment or was appealable under Section 405(g). Respondent is wrong.

a. The EAJA provides that a fee application is due within 30 days of final judgment *in the civil action* for which fees are being sought. 28 U.S.C. 2412(d)(1)(B). And the EAJA also defines the term "final judgment" as a judgment that is not appealable. 28 U.S.C. 2412(d)(2)(G). Under the plain terms of the EAJA, then, the timing of a fee application depends entirely on the existence of a judgment in the underlying civil action and on the appealability of *that* judgment. The terms of the statute therefore belie the distinction respondent seeks to draw between a "judgment" for purposes of the EAJA and for purposes of the underlying cause of action, and also belie the same distinction with respect to that judgment's appealability.[5]

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because "experience suggests that the vast majority of cases remanded under § 405(g) are remanded under sentence four." Br. 21. We do not doubt that sentence four remands are more common than sentence six remands. In our view, however, that relationship cuts against petitioner, for this Court has unanimously characterized *Hudson* as applying to a "narrow class" of cases where a court retains jurisdiction pending remand and the outcome of the civil action depends on the result of the proceedings on remand. *Melkonyan*, 111 S. Ct. at 2162; see also *Finkelstein*, 496 U.S. at 629-631.

[5] Thus, we are puzzled by the Eighth Circuit's conclusory statement that "[a]s a matter of statutory construction and common sense," there is no reason "why an appealable 'final judgment' under § 405(g) must necessarily be a 'final judgment' for purposes of § 2412(d)(1)(B)." *Hafner* v. *Sullivan*, 972 F.2d 249, 252 n.3 (8th Cir. 1992). On the contrary, Section 2412(d)(2)(G) of the EAJA *defines* a final judgment, for purposes of the 30-day filing limit in Section 2412(d)(1)(B), as one that is "not appealable." And as *Finkelstein* and *Melkonyan* establish, a sentence four remand is a final judgment that is appealable. When that judgment is no longer appealable, the EAJA's 30-day clock starts to run.

Respondent also claims (Br. 9) that "this Court itself indicated in *Finkelstein*" that a sentence four remand does not constitute a final judgment for purposes of the EAJA. It is true that in *Finkelstein* the Court distinguished its year-old decision in *Hudson* by noting that the latter case involved the EAJA and not finality under Section 405(g). See 496 U.S. at 629-630. The Court noted, however, that *Hudson* was concerned with the definition of "any civil action" in the EAJA, and disclaimed the notion that *Hudson* dealt with appealability or the timing of when a fee application is due under the EAJA. *Ibid.*

b. Respondent argues (Br. 24-28) that the fact that the Secretary may appeal a sentence-four remand does not mean that a claimant may also do so, and that it is the claimant's right to appeal that should trigger the EAJA's filing requirements. That argument finds no support in the language of the EAJA or Section 405(g), and makes no sense in any event.

First, it is not at all clear that claimants may not appeal sentence four judgments in the same manner as the Secretary. Although *Finkelstein* did mention the practicalities involved, see 496 U.S. at 625, it did not state that the Secretary may appeal only in the limited circumstances in which there is a practical need. On the contrary, the Court noted that sentence eight of Section 405(g) categorically provides that the district court's action under sentence four is a "final judgment" and appealable as such under 28 U.S.C. 1291. 496 U.S. at 625. A final judgment is ordinarly appealable by any party that is aggrieved by it. The Court did not rely on the alternative "collateral order" theory advanced by the government, see 496 U.S. at 632 (Blackmun, J., concurring in the judgment), which would more evidently have afforded a right of appeal only to the Secretary.

Even if respondent is correct, however, that *Finkelstein* authorizes only the Secretary to appeal, that conclusion

does him no good. The language of Section 2412(d)(2)(G) does not limit its definition of "final judgment" to those judgments that were once appealable by the claimant but no longer are (after expiration of the time for taking an appeal). Respondent nonetheless urges (Br. 28) that the language should be read that way, "because the EAJA permits only *claimants*, not the government, to seek fees." If respondent were correct, however, that the EAJA's time period for filing a fee application should be triggered by one party's right to appeal a judgment, that party undoubtedly should be the Secretary. A claimant can get attorney's fees under the EAJA only if he has *won* his case—a situation in which he has no interest in an appeal, and no right to take one. In contrast, in situations where the Secretary has an incentive to appeal, the claimant has obtained a favorable ruling. If the EAJA's filing period is to be triggered by reference to the effect of the judgment at issue, it surely should be triggered by a judgment that is adverse to the Secretary, for it is only then that the question of attorney's fees might arise at all. Respondent's contrary rule—that the time begins to run at some undetermined point when a claimant could appeal, but has no incentive (and perhaps no right) to do so because he has been awarded benefits on remand—lacks anything to commend it.

c. Respondent argues (Br. 8-11) that the EAJA's timeliness requirement cannot mean what it says, because the statute also requires a party to state in his fee application that he is a prevailing party and to allege that the position of the United States was not substantially justified. 28 U.S.C. 2412(d)(1)(B). Contrary to respondent's suggestion, there is no inconsistency between requiring a party to file a fee application before his prevailing party status is finally determined and requiring the party to adhere to the EAJA's limitation on when a fee application must be filed. In fact, the opposite is true;

respondent's position would authorize courts to ignore, on an ad hoc and unpredictable basis, the EAJA's unqualified terms setting forth the time when all fee applications are due.

The EAJA applies across the spectrum of *all* litigation against the federal government; Social Security cases make up some, but not all, of the cases to which the EAJA applies. In establishing a generally applicable 30-day time limit on fee applications, Congress made the deliberate choice to key that time limit to a judgment in the action for which fees are sought. Congress also did not provide any exception to that requirement for Social Security cases in which a litigant's prevailing party status might not be finally determined until after the time period for filing a fee application has expired. Rather than seeking to harmonize the statute's language with the requirement that a fee applicant state he is a prevailing party, however, respondent insists that the plain language of the statute be jettisoned in favor of what he views as a more equitable reading.

Respondent's argument has left him in a dilemma. As we have argued, and as *Melkonyan* specifically recognized, the interplay of the language of the EAJA and sentence four of Section 405(g) requires that EAJA fee applications be filed at the time a case is remanded pursuant to sentence four. Moreover, this Court has found "it clear that * * * a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of EAJA" simply by gaining a remand. *Sullivan* v. *Hudson*, 490 U.S. at 887. See also *Finkelstein*, 496 U.S. at 630.[6] If respondent is correct that the EAJA does not

[6] For the most part, respondent does not question that rule, although he mentions (Br. 12 n.4) that, if he loses on the timeliness issue, simply obtaining a sentence four remand should qualify a party for prevailing party status. As we have noted (Pet. Br. 27 n.16), this case does not call for the Court to decide that issue. Respondent cites

permit a party to file a fee application until he can certify his prevailing party status, it is more logical to conclude that fees are simply not available in cases like his—because plaintiffs who secure only a remand are not prevailing parties—than to conclude that the statutory time limits can be disregarded.

Our view, in contrast, effectuates the EAJA's goal of awarding attorney's fees to parties who ultimately succeed on their underlying monetary claim, while at the same time respecting the time limits for fee applications set by the statute. Our interpretation is also consistent with Section 2412(d)(1)(B), because a person filing a fee application in a remanded case is fully able to state that he has met all the conditions of achieving prevailing party status to that date by succeeding in having the court set aside the Secretary's first decision denying benefits. Pet. Br. 25-28. And, unlike respondent's interpretation, our view seeks to accommodate the obligation "to give effect, if possible, to every word Congress used." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). See *Moskal* v. *United States*, 498 U.S. 103 (1990).

d. Respondent next argues (Br. 22-24) that, even if sentence four remands must accompany sentence four judgments, there was no appealable judgment in this case because the district court failed to enter judgment on a separate sheet of paper as required by Fed. R. Civ. P. 58, and the order was therefore not appealable under Fed. R. App. P. 4(a)(1). This argument is unpersuasive.

In *Finkelstein*, the Court noted that the order at issue there—which was a sentence four remand just like the one at issue in this case—was "unquestionably a 'judgment,' as it terminated the civil action challenging the Secretary's

(Br. 12 n.4) a number of district court decisions in support of his view. But, as this Court recognized in *Hudson*, 490 U.S. at 887, "the vast majority of the Courts of Appeals" have gone the other way. See also Pet. Br. 25 & n.15.

final determination that [the plaintiff] was not entitled to benefits, [and] set aside that determination." 496 U.S. at 625. The Court went on to reject the argument that the label the district court put on its remand order was of any consequence to the order's character as a final judgment: "It is true * * * that the district court did not caption its order as a 'judgment,' much less a 'final judgment.' The label used by the District Court of course cannot control the order's appealability." *Id.* at 628 n.7. So too here, and it is plain under the terms of the EAJA that a final appealable judgment triggers the obligation to file a fee application.[7]

Respondent's sole support for his argument is this Court's dictum in *United States* v. *Indrelunas*, 411 U.S. 216, 222 (1973), that the requirement of a separate judgment "must be mechanically applied in order to avoid * * * uncertainties as to the date on which judgment is entered." See Resp. Br. 23-25. From this, respondent urges (Br. 23) that there is an "absolute requirement" of a separate judgment, and that the absence of such a judgment means that the time for appeal from the original remand order in this case never began to run.

Respondent's reliance on *Indrelunas* is misplaced. This Court's decision in *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978), which respondent does not address, establishes that the failure to enter a Rule 58 judgment does not, as a categorical matter, render a judgment non-final or non-appealable. On the contrary, in that case the Court specifically "disavow[ed]", 435 U.S. at 386 n.7, the mechanical reading of the rule previously endorsed in *Indrelunas*, and relied on by respondent for the proposition that a

[7] Respondent argues that even though the remand order may be appealable, it is not a "judgment" unless it is entered on a separate sheet of paper pursuant to Rule 58. *Finkelstein* itself refutes that argument, for there the Court stated that the remand order was a final judgment for purposes of Section 405(g). 496 U.S. at 627-628.

separate judgment is a categorical requirement for an order to be final and appealable under the federal rules and 28 U.S.C. 1291.[8]

3. Apart from his strained reading of the relevant statutes, respondent's central submission (Br. 11-18) is simple: It makes more "practical sense" to wait for proceedings on remand to be completed before requiring a fee application under the EAJA to be filed. The answer to respondent's contention is equally straightforward: Congress has enacted statutory language that unambiguously requires fee applications to be filed within 30 days of the time a sentence four remand order becomes no longer appealable. If respondent and his *amici* are dissatisfied with that regime, their recourse lies solely with the legislative branch—neither the Secretary nor this Court possesses the authority to disregard the language of the EAJA or Section 405(g).

In any event, we believe respondent exaggerates the relative virtues of his system and the vices of the one actually enacted by Congress. We acknowledge that fee applications probably will be filed in most sentence four remand cases (even though they should be filed only where

[8] As we argued in our opening brief (Pet. Br. 19-20 & n.12), even if respondent's view of Rule 58 and Rule 4(a)(1) were correct, those rules could not authorize district courts to evade the clear terms of Section 405(g)—an Act of Congress delineating the terms under which courts have the authority to remand cases to the Secretary—simply by refusing to enter a judgment in conjunction with a sentence four remand. See Fed. R. Civ. P. 82; *Finley* v. *United States*, 490 U.S. 545, 553 n.6 (1989). Thus, even if respondent were correct (Br. 24) that district courts could "avoid[] the statute of limitations bar" established by Congress simply by failing to enter a separate judgment, such action would be contrary to law. In any event, on respondent's theory, the Secretary would have no duty to initiate proceedings on remand until a seperate document was issued, and the claimant's participation in proceedings on remand would waive any objection to the absence of such a document. See Pet. Br. 19n.12.

the Secretary's action was not substantially justified). We also acknowledge that some number of those applications will ultimately prove to be unnecessary if the claimant fails to receive benefits. The number of unnecessary applications, however, will be fewer than respondent would have this Court believe. In recent years about two-thirds of claimants have succeeded in obtaining benefits on remand, and fee applications in those cases will ordinarily be decided on the merits by the district court. See Social Security Admin., *Annual Report to Congress* 38 (1992) (1992 Report to Congress).[9]

Moreover, the burden involved in filing a typical fee application is not as great as respondent suggests. Br. 15. In this case, for example, respondent's attorney sought compensation for 18.30 hours of his time. See Pet. App. 17a-18a. It is an overstatement to say that the burden of compiling the "detailed contemporaneous time records," or that "an explanation of the compensable expenses incurred" necessary for filing the typical fee application is anything but ministerial.[10]

[9] In Fiscal Year 1991, a total of 2,526 cases were remanded to the agency, and claimants succeeded in getting benefits in 69% of those cases. 1992 Report to Congress 38. The Department of Health and Human Services' statistics regarding remands, however, have not heretofore distinguished between sentence four and sentence six remands. There is therefore no way to know how many of the 795 cases in which claimants were not awarded benefits involved sentence four cases (in which a previously filed fee application would have ended up being superfluous) and how many involved sentence six cases. In Fiscal Year 1990, a total of 4343 remands were ordered, and claimants succeeded in obtaining benefits in 63% of those cases on remand. *Ibid.*

[10] Respondent complains (Br. 15) that fee applicants must file "a comprehensive brief explaining why the Secretary's [position] was not substantially justified." Again, however, respondent's complaint is overstated. He offers no reason why district courts cannot defer the requirement of such a brief until after proceedings on remand are complete. And, in any event, in view of the fact that the civil action is terminated by the sentence four judgment—and the fact that the

Nor would it be unworkable for fee applicants to file protective applications that may be supplemented as necessary after proceedings on remand are complete.[11] Although respondent claims that these protective fee applications will clutter the district courts' dockets, the burden such applications will place on the district courts is not significant. A district court may simply hold such fee applications in abeyance until the parties inform it that the case requires some action.[12] And, under this regime, there is every reason to think that fee applications will be resolved promptly.[13] Claimants, of course, have every

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remand proceedings are non-adversarial and the government takes no position as to a claimant's entitlement to benefits in those proceedings, see *Hudson*, 490 U.S. at 891—the question of substantial justification in every sentence four case will relate solely to the pre-remand proceedings. Thus, there is no reason why a timely fee application cannot properly allege that the position of the United States was not substantially justified.

[11] Of course, if *Hudson* is limited to sentence six cases (as we submit it is), there would ordinarily be no occasion for a fee application following a sentence four remand to be updated at all after the remand proceedings are complete. The sole condition that the claimant would have to meet in order to have his fee application heard would be that he obtain benefits on remand and accordingly become a prevailing party.

[12] As respondent's *amicus* notes (Nat'l Org. of Social Sec. Claimants Br. 12), some districts have already adopted special procedures for dealing with Social Security cases. There is no reason why the courts cannot accommodate a system of protective fee applications that will be held in abeyance pending the outcome of remand proceedings.

[13] In fact, fee applicants will likely get their fees sooner if our view prevails. In neither case will any fee application be conclusively resolved until after the remand proceedings are complete. But if the terms of the statute are enforced as we urge, fee applications will be on file and ready to resolve immediately after the remand proceedings are finished. There will be no need to return to district court to obtain a superfluous (and unauthorized) judgment that would authorize the claimant to file an application; there will be no need to file a new fee application; and, most significantly, the applicant will have every

incentive promptly to return to district court to get that court to act on their pending fee applications.

In many respects, moreover, the regime established by Congress is *more* workable than respondent's. First, if the terms of the EAJA are enforced, a clear rule will be established that fee applications are due 30 days after a remand order is no longer appealable. Thus, there will be no ambiguity in determining the timeliness of an EAJA application.[14] Second, when a party has a pending fee application and later succeeds in obtaining benefits on remand, he has a clear incentive promptly to return to district court to seek his attorney's fees. Under respondent's rule, however, a party will have to file the post-remand record with the district court and seek a "final judgment" for EAJA purposes, even though the district court has already, by definition (see *Finkelstein*, 496 U.S. at 625-627), entered final judgment pursuant to sentence four, and even though there is nothing substantive left for the district court to adjudicate.[15] Moreover,

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incentive to return to district court immediately to seek to obtain his fees.

[14] Respondent and his *amici* argue that confusion will ensue regarding whether remands are pursuant to sentence four or sentence six. That concern, too, is overstated. In the first place, given the significance of the determination, district courts and litigants can ensure that the terms of a court's order leave no doubt as to the character of a remand; in our view, it would be appropriate for this Court to encourage district courts to do so. Moreover, Congress has established specific terms that a sentence six remand must meet, and all other remands must accompany a judgment pursuant to sentence four. See *Melkonyan*, 111 S. Ct. at 2163-2165.

[15] By its terms, Section 405(g) does not authorize the Secretary to bring an action for review of an administrative decision granting benefits. Thus, the post-remand proceedings respondent envisions in district court—in which the court supposedly will enter an additional judgment pursuant to Section 405(g)—by definition would have absolutely nothing to do with the Social Security Act. Indeed, if the claimant has succeeded in getting benefits and is satisfied with the

respondent has not pointed to any statutory requirement, or even authorization, for the Secretary to take the post-remand actions he contemplates.[16]

In the end, what is important is that a clear and workable rule be established, and that the rule be consistent with the language of the EAJA and Section 405(g). The rule we propose is practical; and, in fact, it will likely result in fees being awarded sooner and more efficiently to successful applicants. Moreover, there is nothing to respondent's assertion that requiring fee applications to be filed when a case is remanded to the agency lays "a trap for the unwary." Resp. Br. 17 (quoting H.R. Rep. No. 120, 99th Cong., 1st Sess. Pt. 2, at 6 n.26 (1985)). On the contrary, our rule sets out a perfectly clear standard for when fee applications are due. The courts

administrative decision, there is no case or controversy for the district court to adjudicate apart from the application for attorney's fees under the EAJA. That statute, of course, does not create any independent cause of action, but instead depends on the presence of a distinct civil action.

[16] Respondent relies (Br. 5, 32, 37) on the Secretary's representation to the Third Circuit nine years ago that the government will file the post-remand record with district courts, see *Brown* v. *Secretary of Health & Human Services*, 747 F.2d 878 (1984), as demonstrating the workability and lawfulness of such a system. The government's concession in *Brown*, however, is insignificant. First, the fact that the government agreed then that it would follow respondent's proposed procedure does not speak at all to the question whether that procedure is required by the statute. Moreover, that representation was made at a time when neither the courts nor the Secretary distinguished between sentence four and sentence six remands; at that time, it was thought that the second clause of sentence six applied generally to remands under Section 405(g), and that district courts possessed the authority under sentence seven to review post-remand administrative proceedings. This Court's decision in *Finkelstein*, however, squarely rejected that reading of the statute, 496 U.S. at 626-627, and hence fatally undermined the premises of the Secretary's representation in *Brown* (which applied only in the Third Circuit, see 747 F.2d at 884).

have every right to expect that government appeals from sentence four remand orders will be filed in a timely manner, and there is no reason why the same should not be true for fee applicants in such cases. Finally, our rule, in contrast to respondent's, conforms with the language of the relevant statutes and with this Court's cases interpreting that language.

4. Respondent next urges (Br. 31-41) that even if the Court agrees with us on the merits—with the result that his fee application was late because it was filed more than a year after his case was remanded to the agency pursuant to sentence four—its ruling should not be applied retroactively to his case. We do not believe that the Court should resolve this issue, which was neither raised nor passed upon below. The appropriate course would be for the Court to remand the case to the court of appeals for it initially to consider respondent's non-retroactivity argument.

In any event, there is no merit to respondent's non-retroactivity submission. It is well established (and respondent does not dispute) that courts may not decline to apply jurisdictional rules retroactively. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981). The time limit for fee applications under the EAJA is jurisdictional in nature, and it is not subject to waiver. In *Welter*, the Eighth Circuit acknowledged as much, stating that courts "lack jurisdiction to consider * * * fee applications filed" outside the 30-day limit. Pet. App. 5a. In the past, other courts of appeals reached the same conclusion.[17] In contrast, respondent cites (Br. 39

[17] See, *e.g.*, *American Ass'n of Retired Persons* v. *EEOC*, 873 F.2d 402, 407 n.7 (D.C. Cir. 1989); *Dunn* v. *United States*, 775 F.2d 99, 103 (3d Cir. 1985); *Allen* v. *Secretary of HHS*, 781 F.2d 92, 94 (6th Cir. 1986); *Jabay* v. *Sullivan*, 920 F.2d 472, 473 (7th Cir. 1990); *Olson* v. *Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Myers* v. *Sullivan*, 916 F.2d 659, 666

n.13) only a few district court cases in support of his assertion that the EAJA's time limits are not jurisdictional.

Respondent also argues (Br. 38-39) that this Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), undermined the basis for the uniform view of the courts of appeals that the 30-day filing period is jurisdictional. The Eighth Circuit's decision in *Welter*, however, post-dated *Irwin*, and that court did not question the continuing validity of the view that the EAJA's time limit on filing fee applications is jurisdictional. In our view, *Irwin* should not be viewed as having established that the limitations period in the EAJA is non-jurisdictional.

In *Irwin*, the Court held that 42 U.S.C. 2000e-16(c), which allows a federal employee to file a Title VII action in district court within 30 days of the administrative decision, is not jurisdictional, but rather is subject to equitable tolling in appropriate circumstances. 498 U.S. at 94-96. In the course of its discussion, the Court chose to state a "more general rule" that once Congress has waived the government's sovereign immunity, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. Thus, contrary to respondent's suggestion (Br. 38-39), the Court established in *Irwin* only a rebuttable presumption, not an

(11th Cir. 1990); *United States* v. *J.H.T., Inc.*, 872 F.2d 373, 375 (11th Cir. 1989); *Haitian Refugee Center, Inc.* v. *Meese*, 791 F.2d 1489, 1494 (11th Cir. 1986); *Beta Systems, Inc.* v. *United States*, 866 F.2d 1404, 1405 (Fed. Cir. 1989); *J.M.T. Mach. Co.* v. *United States*, 826 F.2d 1042, 1046-1047 (Fed. Cir. 1987); *Action on Smoking & Health* v. *CAB*, 724 F.2d 211, 225 (D.C. Cir. 1984); *Premachandra* v. *Mitts*, 753 F.2d 635, 642 n.10 (8th Cir. 1985); *Clifton* v. *Heckler*, 755 F.2d 1138, 1144-1145 (5th Cir. 1985).

absolute rule applicable to all statutes prescribing time limits for filing suits against the government.

The EAJA states in mandatory terms a condition on the United States' waiver of immunity—that a party "shall" file a fee application within 30 days of judgment. 28 U.S.C. 2412(d)(1)(B). And, unlike the statute at issue in *Irwin* —Title VII—the EAJA has no application in any context except for suits against the United States. The decision in *Irwin* rested in part on the notion that, because statutes of limitations are "customarily" not jurisdictional in "lawsuits between private litigants," *Irwin*, 498 U.S. at 95, the same conclusion in government litigation "is likely to be a realistic assessment of legislative intent." *Ibid.* EAJA litigation, however, by definition cannot take place between private parties, and there is therefore no basis for a similar assessment of legislative intent to permit modification of the express pre-conditions to suit established in that statute.[18] Thus,

[18] The legislative history of the EAJA indicates that Congress understood the EAJA's time limits to be jurisdictional in nature. As we argued in our opening brief (Pet. Br. 21 n.14), the Senate Report on the bill ultimately enacted as the 1985 EAJA amendments explained that the issue of when a "judgment" is deemed "final" under 28 U.S.C. 2412(d)(2)(B) "is important since the thirty-day deadline for filing the fee application is jurisdictional and cannot be waived." S. Rep. No. 856, 98th Cong., 2d Sess. 16 (1984). In addition, there was extensive hearing testimony to the same effect. See *Equal Access to Justice Act Amendments: Hearing on H.R. 5059 Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 38 (1984) (Dep'ty Ass't Att'y Gen'l Kuhl) (when "final judgment" occurs is important because the "thirty-day deadline for filing the application is jurisdictional and cannot be waived"); *Reauthorization of Equal Access to Justice Act: Hearing Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 32 (1983) (statement of Ass't Att'y Gen'l McGrath) ("thirty-day deadline for filing the application is jurisdictional and cannot be waived by the government or even the court"); *id.* at 75 (quoting Small Business Legal

we submit that the major premise underlying the *Irwin* decision is not present here, and that the EAJA's mandatory time limit should continue to be viewed as jurisdictional.

* * * * *

For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Defense Committee & D. Stewart, "The Equal Access to Justice Act: An Attorney's Handbook") ("it has been held that the 30-day requirement from time of final judgment is jurisdictional and may not be waived"); *Implementation of the Equal Access to Justice Act: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 3, 5 (1982) (Ass't Att'y Gen'l McGrath) ("jurisdictional and cannot be waived"); *Equal Access to Justice: Hearing Before the Subcomm. on Agency Admin. of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 14 (1987) (same).

It is true (see Resp. Br. 39) that the House Report that accompanied the bill that was ultimately signed did not address the issue specifically, as had the earlier Senate Report. But the House Report did note that fee petitions "must be filed" within 30 days of final judgment. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 7 (1985). See also H.R. Conf. Rep. No. 1434, 96th Cong., 2d Sess. 26 (1980) (EAJA "requires" filing within 30 days); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 18 (1980) (party "must apply" within 30 days). There was no suggestion, moreover, that the time period was *not* jurisdictional in nature. That fact is significant because a number of courts of appeals had already held that the EAJA's filing periods are jurisdictional (see Pet. Br. 21 n.14) when Congress amended the EAJA in 1985. *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379-382 (1982). See also cases cited in note 17, *supra*.

Thus, the legislative history of the specific provision before the Court refutes *Irwin's* premise that treating time limits as non-jurisdictional "is likely to be a realistic assessment of legislative intent," 498 U.S. at 95. Exactly the contrary is true here.

Respectfully submitted.

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No. 92-311

In The

Supreme Court of the United States

October Term, 1992

DONNA E. SHALALA, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICUS CURIAE NOSSCR

The National Organization of Social Security Claimants' Representatives ("NOSSCR") is a non-profit corporation. Most of our members are attorneys who regularly represent people claiming disability benefits in administrative proceedings before the Social Security Administration of the U.S. Department of Health and Human Services ("HHS").

Our members often file actions in federal court against the Secretary of HHS ("the Secretary" or "the agency"), appealing final administrative denials of benefit claims. Such civil actions are filed under the judicial review section of the Social Security Act, 42 U.S.C. § 405(g).

Where the civil action leads to an award of benefits, and it appears that the agency acted unreasonably in denying the claim, our members often file applications in court to shift the burden of attorney fees from the disabled claimant to the agency under the Equal Access to Justice Act ("EAJA"). 28 U.S.C. § 2412(d).

Our members and their clients want to keep the EAJA application process simple and fair, without "traps for the unwary." Our disabled clients who need access to the courts to challenge unreasonable denials of their claims should not have to jump extra procedural hurdles in order to be made whole under the EAJA. Thus we oppose the agency's suggestion that claimants must file premature "protective" fee applications before they win their claims.

Hundreds of our disabled clients are threatened by the retrospective trap that the agency seeks to spring in this case. The agency is opposing meritorious EAJA applications on timeliness grounds, using the theory that

the EAJA applications should have been filed at the time of court remand orders. The agency and everyone else previously considered these orders to be interlocutory.

Beyond the EAJA fee question, NOSSCR is interested in a larger issue: preserving the stable structure of judicial review under 42 U.S.C. § 405(g). The existing straightforward procedures are threatened in two ways by the agency's arguments.

First, the agency would extend this Court's decision in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), to make immediately appealable by both parties all garden-variety remands where the district court finds on the record that further Social Security proceedings are needed. We do not want these remands to be immediately appealable. Most of our clients, pursuing a subsistence benefit, can ill afford fragmentation of their litigation into stages.

Second, the agency's arguments would end the district court's jurisdiction too early, at the time of remand orders that do not resolve the underlying question of entitlement to benefits. If the agency still denied benefits on remand, the claimant would have to file a separate civil action to come back to the court. The "second civil action" theory would multiply litigation, burdening our clients as well as the courts.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that when the district court remanded Mr. Schaefer's disability case for further administrative proceedings, the court retained jurisdiction to enter a later "final judgment" after the remand proceedings were completed. That judgment, after all appeal periods ran, would be the "final judgment" under the EAJA to trigger the 30-day filing period.

The agency disagrees, saying that the district court's remand order, by itself, was the EAJA "final judgment."

The agency's theory of "file now, prevail later" violates the EAJA and is based on a rigid reading of the dicta in *Melkonyan* that would overextend *Finkelstein* and gut *Hudson*. The underlying reading of § 405(g) would create difficult problems in Social Security practice, which we describe here.

NOSSCR requests the Court to limit the dicta in *Melkonyan* by holding that final judgments need to accompany only those remand orders that effectively end the litigation on the merits by resolving all of the issues properly raised in the complaint. *Hudson*, *Finkelstein*, and *Melkonyan* should be reconciled in a practical way that preserves the existing stable framework of judicial review in thousands of Social Security cases each year.

ARGUMENT

I. The language and purpose of the Equal Access to Justice Act make this fee application timely.

Forcing claimants to file fee applications shortly after fourth-sentence remands while the outcome of the disability claim is still within administrative discretion is inconsistent with Congress's intent in enacting 28 U.S.C. § 2412(d)(2)(G) (1985 Amendments to the EAJA). That section defines "final judgment" as one that is no longer appealable, thus protecting claimants from having to "tip their hands" by filing for fees before the merits are put to rest. Claimants should not be forced to signal that they intend to file for attorney fees against the agency while the agency is still considering their disability claims.

We agree with Respondent Schaefer's argument that the EAJA does not require filing fee applications before

becoming a "prevailing party." The agency's position, that protective applications must be filed which cannot be ruled upon until the claimant "fully" prevails by winning benefits on remand, is far-fetched and could not have been intended by Congress. We agree also with the narrower grounds for saving this application urged by Respondent Schaefer: Rule 58, equitable tolling, and nonretroactivity. None of these arguments will be repeated here.

II. Congress gave the district courts extensive jurisdiction in Social Security cases.

Virtually all Social Security litigation is brought under 42 U.S.C. § 405(g), the section of the Social Security Act providing for judicial review. Appendix 1. In enacting § 405(g) in 1939, Congress granted the district courts great power and flexibility to resolve Social Security cases. 53 Stat. 1362, 1368. Congress apparently chose the district courts because of the fact-intensive nature of individual Social Security cases.

The grant of power to the district courts was extensive by comparison with other statutes that allow judicial review of agency action. This Court has noted that § 405(g) places the courts virtually as coparticipants with the agency in decisionmaking. *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989). Congress expressly granted district courts the power to rewrite agency decisions by "modifying" them, effectively standing in the shoes of the agency.

Congress also expressly granted the discretion to remand to the agency for a rehearing, a power not expressly mentioned in many judicial-review statutes. Previously, where statutes were silent about the power to remand, a power to remand was implied from Congress's

expressly vesting in a court of equity the greater power to reverse the agency decision. *See, Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372 (1939).

III. The realities of Social Security litigation should be kept in mind.

In recent years, thousands of Social Security cases have been reviewed in federal courts annually. Most are about disability. The numbers ranged from a high of more than 20,000 cases filed each year during the early 1980s when the Administration attempted to cut off the benefits of many disability recipients, to a more manageable 7,398 cases filed in fiscal year 1991.[1]

The district courts handle Social Security cases by reviewing the pleadings, the administrative record, and cross-briefs, with occasional oral arguments. The cases are often heard by United States Magistrate Judges.

This system of judicial review reaches the merits of Social Security cases with minimum waste of time by the court and parties. The median EAJA attorney fee award is less than $3,000, *Pierce v. Underwood*, 487 U.S. 552, 563 (1988), indicating that claimants' attorneys spend fewer than 40 hours on this federal court litigation.

More complex cases like class actions, or *Finkelstein*-type cases where a regulation is invalidated by the court, are rare. Most remands present routine issues such as whether the evidence against disability was substantial,

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[1] 1992 Social Sec. Admin. Rep. to Congress 31. It is revealing that the agency, even after *Melkonyan*, excluded remands from "Final Court Decisions" in this report, n.1. All statistics from the year 1991 used in this section of our brief are taken from this report.

whether the agency gave proper weight to evidence, whether a vocational expert's testimony was needed, or whether the agency followed its regulations. Some cases bounce up and down between the court and the agency several times before resolution. *See, e.g., Bell v. Bowen*, 658 F. Supp. 533, 534-35 (C.D. Ill. 1987) (district court remanded twice, then reversed agency).

What happens to Social Security cases in court? Many claimants lose in court. 2,921 denials were upheld by the court in 1991. The court in those cases enters a final judgment affirming the agency's decision. A few actions are dismissed, either at the claimant's request or due to lack of jurisdiction. 606 actions were dismissed in 1991. The court in those cases enters a final judgment dismissing the civil action.

1,018 claimants won their claims in court in 1991. On entitlement cases, the court enters a final judgment reversing the agency's decision, and often orders a so-called "remand" for calculation and payment of benefits. *See, e.g., Reed v. Secretary of HHS*, 804 F. Supp. 914, 916 (E.D. Mich. 1992). We will refer to these remands as "dispositive" to distinguish them from "non-dispositive" remands, where the court remands without deciding about entitlement.

A larger group receives non-dispositive, "true" remands for further administrative proceedings on the entitlement issue. 2,526 claims were remanded by the courts in 1991. A few of these are at the request of the agency before it files its answer ("Secretary-motion" remands), and more are at the request of either party to take new evidence ("new-evidence" remands). The most common remands are "agency-error" remands such as Respondent Schaefer received: the court reviewed the

record, found error, believed that further agency proceedings were necessary, and remanded with instructions for a rehearing. In 1991, the agency awarded benefits in 69% of the court-remanded cases.

On these agency-error non-dispositive remands, some courts simply enter a remand order without more. Some say they are reversing and remanding for further proceedings, as in this case. Still others say they are reversing and remanding and enter a judgment or even a "final judgment."

Prior to *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991), it was clear that if judicial review was necessary after court remands, the case would be heard again in the same civil action, usually via a motion to reopen or to reinstate the case on the active docket. *See, e.g., Wilson v. Heckler*, 609 F. Supp. 120, 124 (W.D. Mo. 1985). Dicta in *Melkonyan* have caused some courts to doubt their jurisdiction to reopen the original case. *Frizzell v. Sullivan*, 937 F.2d 254 (5th Cir. 1991).

"Dispositive" and "agency-error" remands are under sentence four of § 405(g), and "Secretary-motion" and "new-evidence" are under sentence six. To complicate the matter, a single remand order can contain a combination of the types of remands, affirmances, reversals, modifications, and partly-favorable decisions on the various claims and time periods presented in a single civil action.

For example, a claimant may have three benefit applications pending: a disability insurance benefit (DIB) claim on her own earnings record, a disabled widow's claim on the decedent's record, and an SSI disability claim based on her poverty. Two time periods may be involved, before and after her 55th birthday. In one order, a court might affirm the denial of SSI benefits due to

excess income, reverse the denial of DIB benefits as of age 55 and remand for payment, remand the pre-age-55 DIB claim for further administrative proceedings due to agency error in not using a vocational expert where required by the regulations, and remand the disabled widow's claim to take new, previously unavailable evidence that the deceased wage earner had been fully insured.

Another reality of Social Security practice shown by the above example is that denial decisions on two or more distinct benefit claims typically are challenged in a single civil action for the sake of judicial economy. Many "concurrent" claims for different types of benefits are heard by the courts. Although § 405(g) could be read to imply a separate civil action for each final decision of the Secretary, no court has ever required separate civil actions in concurrent claims.

IV. The Secretary does not always comply with court remand orders.

The agency all too frequently violates the terms of court remand orders. Sometimes the district court must step in and exercise its jurisdiction before the remand proceedings are completed.[2] More often, the district court

[2] *E.g.*, *McKeever v. Heckler*, 595 F. Supp. 1131, 1132 (E.D. Wis. 1984) (despite the court's remand to the Secretary for further proceedings, an agent of the Secretary told plaintiff that he had previously been given three hearings, that his case was now officially closed and that it would not be reopened for any reason; the court ordered the Secretary within 10 days to schedule the new hearing, or face contempt proceedings); *Haire v. Bowen*, No. C-82-350-M (W.D.N.C., Charlotte Div. February 28, 1986) (17 months after remand, despite efforts of plaintiff's attorney, no hearing held or scheduied; court ordered Secretary to advise why Secretary should not be held in contempt); *Hinton v. Sullivan*, No. 84 Civ. 9276 (CES), 1991 U.S. Dist. LEXIS 8915 (S.D.N.Y. July 2, 1991) (court held the Secretary in civil contempt for not complying with a remand order requiring payment of interim benefits; the Secretary's employees had purposely entered "phony" information into plaintiff's computer record to prevent the computer from generating monthly checks to plaintiff).

finds on review of the results of the remand proceedings that the agency violated the express or implied terms of the remand order.[3]

[3] *E.g.*, *Valdez v. Schweiker*, 575 F. Supp. 1203 (D. Colo. 1983) (administrative law judge had refused to comply with district court's remand order requiring application of circuit precedent, district court threatened to use contempt powers if the agency refused to obey court remands in future cases); *Holst v. Bowen*, 637 F. Supp. 145 (E.D. Wash. 1986) (the ALJ erred in trying to overrule the district court's remand order); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991) (on remand for a different purpose, the administrative law judge changed his estimate of the claimant's work capacity from sedentary to light); *Skelton v. Bowen*, 668 F. Supp. 629, 631 (N.D. Ohio 1987) (agency on remand tried to "reshuffle the cards after the plaintiff was dealt a winning hand"); *Davis v. Secretary of HHS*, 634 F. Supp. 174 (E.D. Mich. 1986) (ALJ cannot change the finding about the claimant's residual functional capacity on remand, which was implicitly affirmed in the remand order); *Ramos v. Secretary of HEW*, 373 F. Supp. 260 (D.P.R. 1976) (court remanded the case a second time, after the agency failed to abide by the prior remand order); *Milazzo v. Schweiker*, 562 F. Supp. 1 (E.D. Pa. 1983) (reversal due to lack of explicit findings and development, despite prior remand); *Lucena v. Secretary of HHS*, 601 F. Supp. 168 (D.P.R. 1985) (remanded a second time for development of an adequate record); *Mefford v. Gardner*, 383 F.2d 748 (6th Cir. 1967).

V. District courts have jurisdiction to enter "final judgments" after the agency completes its remand proceedings.

Respondent Schaefer won benefits on remand. The Eighth Circuit correctly held that the district court retained jurisdiction to enter a post-remand final judgment that would trigger the EAJA filing period. Such retained jurisdiction exists as a safeguard in a case where benefits are awarded on remand, and is vitally necessary where benefits are still denied. *See*, Section IV of this brief, above.

Statistically, as shown above, 60-70% of the claimants win on remand. However, where the claimant is denied (or partially denied) on remand, and seeks judicial review again, the issues in court often include whether the agency abided by the terms of the remand order and whether certain findings were implicit in the remand order so as to become the "law of the case." *E.g., Key v. Sullivan*, 925 F.2d 1056, 1060-63 (7th Cir. 1991); *Angevine v. Sullivan*, 881 F.2d 519, 522 (7th Cir. 1989); *Davis v. Secretary of HHS*, 634 F. Supp. 174 (E.D. Mich. 1986).

The agency does not consider the remanded case to be a new claim. The agency's regulations mandate different, streamlined procedures in determining disability after a court remand. 20 C.F.R. § 404.983-.984 (promulgated 1989). The claim goes to the top, not the bottom of the administrative hierarchy.

Those regulations about court remand cases were issued under the long-standing assumption that court jurisdiction continues during all court remands. As a result, the regulations are ambiguous about whether a claimant must exhaust the administrative step of filing exceptions with the agency's Appeals Council. 20 C.F.R.

§ 404.984(b) (you "may" file exceptions with the Appeals Council); *cf.*, 54 Fed. Reg. 37791 (September 13, 1989) ("because courts in most instances retain jurisdiction of civil actions when they remand them to the Secretary, we cannot bar a person's right to return to that court"). If the claimant does not file exceptions with the Appeals Council, no written document is issued marking the date on which the new administrative law judge decision becomes final. 20 C.F.R. § 404.984(d).

The agency's regulations about court remands call the new administrative decision the "final decision of the Secretary after remand." 20 C.F.R. § 404.984(b)(2), (d). The agency chose the terminology "final decision of the Secretary *after remand*" instead of "final decision of the Secretary" so as not to "mislead a claimant, whose case has been remanded by a court, into believing that the claimant must file a new civil action to obtain judicial review." 54 Fed. Reg. 37791 (September 13, 1989). The agency's position in this case contradicts its own regulations.

A. Historically district courts in Social Security cases have retained jurisdiction during all remands, with the full agreement of the Secretary, and have employed simple procedures to review the merits a second time if necessary.

"Generally, a remand order is an interlocutory order that does not divest a court of jurisdiction over the case." *Avery v. Secretary of HHS*, 762 F.2d 158, 163 (1st Cir. 1985); *Brown v. Secretary of HHS*, 747 F.2d 878, 884 (3d Cir. 1984) (the Secretary represented to the court that it would bring the results of *all* remands back to the court after remand proceedings were completed); *Wilson v. Heckler*, 609 F. Supp. 120 (W.D. Mo. 1985) (the Secretary successfully

sought dismissal of a second civil action filed by a Social Security claimant after court remand proceedings were finished; the Secretary conceded that the district court retained jurisdiction after the fourth-sentence remand).

The Secretary's informal practice before *Melkonyan* is described in *Wilson*, 609 F. Supp. at 123 n.2:

> When the additional proceedings in a post-decision remand case result in a decision favorable to the claimant, the Secretary sometimes merely files a request for dismissal, and sometimes files nothing at all – as this Court suggests today [citation omitted]. In cases wherein the decision on remand is partially favorable and partially unfavorable, it appears to be her practice to notify the claimant that he has 10 days within which to notify her if he desires to appeal. If so, she will prepare a supplemental transcript. If not, then again, either a motion to dismiss or nothing is filed.

Some district courts have issued standing orders regarding how post-remand district court review is to be handled in Social Security cases. For example, the magistrates in the Southern District of Ohio (Western Division) issued Magistrate's General Order No. 5 dated October 15, 1987. Paragraph 8 of that general order reads:

> If the District Court orders the case remanded to the Secretary for further proceedings, the case shall be closed upon the docket of the District Court. If plaintiff desires to challenge any decision of the Secretary that is issued after remand, plaintiff shall file a motion to reopen the case.

B. The general rule of administrative law is that courts remanding to an agency retain jurisdiction over the case.

Historically, remands to lower tribunals were ordered in aid of the court's jurisdiction, where the court needed to possess some information that the record did not provide before deciding the questions presented. *See, e.g., Estho v. Lear*, 7 Pet. 130, 131 (U.S. 1833) (Marshall, C.J.).

The equitable remand power was used to remand cases to administrative agencies while retaining jurisdiction. *See, Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372 (1939) (there was no doubt that if the N.L.R.B. did not comply with the court's remand order within a reasonable time, the court could vacate its order of remand).

Retention of jurisdiction is implied from the very fact that a court remands to an administrative agency. In *Druid Hills Civic Ass'n. v. Federal Highway Administration*, 833 F.2d 1545 (11th Cir. 1987), a citizen group challenged an environmental impact study by the government. The court remanded for further proceedings by the Secretary of Transportation. After the remand proceedings were completed, the citizen group opposed the district court's approval of the agency's new decision and findings, contending that the court had lost its jurisdiction over the case when it remanded back to the agency. The court of appeals held that the district court had continuing jurisdiction to approve the agency's findings after remand. The court of appeals stated that "the purpose of a remand order is to continue litigation rather than terminate it." *Druid Hills*, 833 F.2d at 1549.

C. The language of § 405(g) does not prevent the district court from retaining jurisdiction to enter a final judgment after "fourth-sentence" remand proceedings are finished.

Read as a whole, § 405(g) does not prevent a district court from delaying the entry of judgment after fourth-sentence remands. The text is ambiguous.

This Court has suggested that a judgment must be entered "with" a sentence-four remand. Admittedly "with" can mean "in conjunction with." *Finkelstein*, 496 U.S. at 629, *Melkonyan*, 111 S.Ct. at 2164, 2165. However, the word "with" in the fourth sentence of § 405(g)[4] can also mean "using," which allows the district court to delay its entry of judgment and retain jurisdiction. An example would be: "the court shall have power to enter a judgment with or without referring the matter to a master." "With" can be "used as a function word to indicate the means, cause, agent or instrumentality," as in "hit him with a rock." *Webster's Ninth New Collegiate Dictionary* 1355 (Merriam-Webster, 1988).

Finkelstein noted that sentence four is silent regarding post-remand judicial proceedings. *Finkelstein*, 496 U.S. at 626-27. Since post-remand judicial proceedings are mentioned after the semicolon in sentence six, it has been argued that the silence in sentence four is telling.

However, post-remand *administrative* proceedings are also mentioned after the semicolon in sentence six, but no one supposes that the silence in sentence four about post-

[4] "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing."

remand administrative proceedings enables the Secretary to ignore court remand orders. The remand proceedings, new findings, and new decision are identical in fourth- and sixth-sentence remands.

By contrast, Congress needed to use language in the 1984 Social Security Disability Benefits Reform Act to achieve the result that the agency now claims Congress had already chosen by silence in sentence four of § 405(g). The 1984 Reform Act required the courts to remand all cases that raised the "medical improvement" issue, and deemed the agency's decisions after the court remands to be new decisions, which "shall be subject to further . . . judicial review only in conformity with the time limits, exhaustion requirements, and other provisions of [§ 405(g)]." Pub. L. No. 98-460, § 2(d)(4), 98 Stat. 1794.

Finkelstein further reasoned that the first sentence of § 405(g), stating that an individual may obtain judicial review of any final decision of the Secretary by filing "a civil action," suggests that "each final decision of the Secretary will be reviewable by a separate piece of litigation," thus making it unlikely that Congress intended post-remand judicial proceedings. *Finkelstein*, 496 U.S. at 625. However this textual suggestion proves too much. If each final decision must be challenged by a separate civil action, then the agency by issuing separate decisions on concurrent SSI and Disability Insurance Benefits claims could force the claimant to file multiple civil actions. 20 C.F.R. § 404.952 (administrative law judge has discretion whether to consolidate hearings on related claims, and whether to issue separate decisions).

It is unlikely that Congress intended to treat fourth- and sixth-sentence remands so differently. Congress explicitly chose to give the district courts continuing

jurisdiction after both types of sixth-sentence remands, "Secretary-motion-before-answer" and "new-evidence" remands. But the two kinds of remands described in sentence six are quite dissimilar.

In a Secretary-motion remand, the court never receives an administrative record and never makes any analysis of the proceedings below. In a "new-evidence" remand, the court reviews not only the new-evidence proper, but also must conduct an extensive review of the administrative record to decide whether the evidence is new, whether it is material, and whether good cause exists for its not appearing in the record earlier. The materiality requirement involves the court in a thorough analysis of the basis for the agency's decision, to see whether the new evidence might change the result. The court's review of the record makes new evidence remands similar to sentence-four remands, and quite unlike "Secretary-motion" remands.

Continuing court jurisdiction is more necessary with remands under sentence four than with remands under sentence six. In Secretary-motion remands, there is no adversity of interest between the parties, since the Secretary is not taking a position contrary to the claimant's in court. And in new-evidence remands, the positions of the parties are also not adverse. The addition of new material evidence to the record makes it a new case. The result may change without any implication that the Secretary was wrong originally.

In sentence-four remands, however, the court has reached the merits, found error and issued an order that is subject to continuing adversary interpretations by the parties. The need for continuing court jurisdiction after a finding of agency error may have been so obvious to Congress that the traditional continuing jurisdiction was

not explicitly stated in sentence four. Only sentence six, where the necessity of continuing court jurisdiction is much less obvious, needed an explicit statement of the post-remand remedies.

The unusual shared jurisdiction between court and agency in Social Security cases which was noted in *Sullivan v. Hudson* is more necessary after fourth-sentence than sixth-sentence remands. There is much more reason for district courts to serve "virtually as coparticipants with the agency" in decisionmaking on the claim after agency-error, fourth-sentence remands than after Secretary-motion remands and new-evidence remands.

The sixth-sentence requirement of the Secretary filing a new decision with the court, and the seventh-sentence requirement of post-remand judicial review, apply to fourth-sentence remands as well as sixth "by simple analogy." *Alexander v. Heckler*, 612 F. Supp. 272, 276 (D.R.I. 1985). It is difficult to imagine Congress covering Secretary-motion and new-evidence remands with the blanket of continuing court jurisdiction, while leaving agency-error remands out in the cold.

All of the language of § 405(g) discussed in this section was enacted in 1939. Congress in 1939 could have set aside a special class of remand orders, made them immediately appealable, and terminated the district court's jurisdiction. However, an innovation of this magnitude would likely have been made explicit in the language of § 405(g) rather than by inference, *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946), and the legislative history would likely have stated Congress's reasons for the experiment.

The legislative history of § 405(g) in 1939 gives no sign that such innovations were intended. The Congressional reports briefly stated that the judicial review was

intended to be similar to that over actions of other agencies. H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939).

D. Another section of the Social Security Act requires a post-remand judgment for its proper operation.

There is another section of the Social Security Act that presupposes that district courts have the very power to enter a post-remand judgment that the agency denies in this case. Denying post-remand jurisdiction in the district court would prevent the proper operation of the attorney fee section of the Social Security Act, 42 U.S.C. § 406(b). Appendix 2. That section was not examined in *Melkonyan* or *Finkelstein*. Section 406(b) presupposes the possibility of a judgment, by reason of which the claimant is entitled to past-due benefits at the end of each successful Social Security court case, as the basis for approving, the 25% contingent attorney fee. Unlike EAJA fees, the fees under § 406(b) are paid by the claimant out of past-due benefits.

A fourth-sentence remand does not itself entitle the claimant to any past-due benefits. Therefore, for § 406(b)(1) to work as intended, a judgment must be entered in the same civil action after the remand is successfully concluded. If no such judgment were possible, either the attorney could charge a completely unregulated fee or the attorney could never be paid for the services rendered in the district court obtaining the remand, depending on how § 406(b) were interpreted.

Neither interpretation of § 406(b) is plausible. Congress could not have intended to create this gaping hole. The Court should read § 405(g) in such a way as to harmonize with § 406(b)(1).

VI. There is no clear distinction between fourth- and sixth-sentence remands.

A great deal of litigation has occurred since *Melkonyan*, with the parties disagreeing about the characterization of remands in many of the cases. WESTLAW lists more than 180 cases citing *Melkonyan*, and we believe that more are not reported. Unfortunately, there are "gray areas" between fourth- and sixth-sentence remands which will continue to produce litigation so long as the procedural consequences of classification are different.

The first gray area between the remands is on Secretary-motion remands. The statute states that the Secretary could obtain such a remand "on motion before answer." If the Secretary delays the motion for remand until after answer, the Secretary can argue that it is no longer a sixth-sentence remand. Unfortunately, since this Court's decision in *Melkonyan* the Secretary has begun a pattern of waiting until after answer to request a remand and asking that the remand be characterized as fourth-sentence.

Surely, Congress did not intend for the Secretary to have the power to control whether a remand is pursuant to the fourth or sixth sentence of § 405(g) simply by the timing of the remand request. If so, the Secretary can decide whether the lifeline extended to claimants is a foot short. *See, Sullivan v. Hudson*, 490 U.S. at 890. The possibility that the Secretary can transform a sixth-sentence remand into a fourth-sentence remand suggests that Congress did not intend the two types of remands to have different consequences. Why would the Secretary ever move for remand before answering the complaint, if by delaying the filing the Secretary could terminate the district court's jurisdiction at the time of the remand and

argue that *Hudson*-type EAJA fees cannot be awarded for the services of plaintiff's attorney during the administrative proceedings on remand?

The distasteful possibility also arises that the agency could judge-shop by timing its remand motion. The agency could remove a Social Security case from the docket of a judge it did not like, merely by delaying filing its motion to remand until after answer.

There is also a gray area between new-evidence and agency-error remands. Much of the litigation since *Melkonyan* has been in this area. *See, e.g., Cummings v. Sullivan*, 950 F.2d 492 (7th Cir. 1991); *Damato v. Sullivan*, 945 F.2d 982 (7th Cir. 1991); *Petition of Thomason*, 777 F. Supp. 1277 (D.S.C. 1991).

Often the Secretary has a duty to develop certain evidence in the claim, put it in the record, or consider it. The duty may arise from caselaw holding that the burden of coming forward with evidence shifts to the agency after the claimant has proved a prima facie case of disability, from the Social Security Act,[5] or from the Secretary's own regulations.[6]

Where the Secretary has violated a duty to develop or consider certain evidence, the remanding court will

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[5] *E.g.*, 42 U.S.C. §§ 421(h) (in mental cases, the Secretary must have a report from a psychologist or psychiatrist), 423(d)(5)(B) (Secretary must develop a complete medical history of at least the preceding 12 months before denying disability, and must try to obtain necessary medical evidence from the claimant's treating physician before going to an outside source).

[6] *E.g.*, 20 C.F.R. §§ 404.951 (administrative law judge has duty to make a complete record of the hearing proceedings), 404.970(b) (the Appeals Council must evaluate new and material evidence submitted to it, if the evidence relates to the period adjudicated by the administrative law judge).

find error but also will "order additional evidence to be taken before the Secretary," § 405(g) (sixth sentence). Assuming that the evidence is both new and material, and that the Secretary's breach of duty can be "good cause for the failure to incorporate such evidence into the record in a prior proceeding," then the remand may meet the requirements of both sentence four (agency error found on review of record) and sentence six (new evidence).

The 1980 amendment to sentence six of § 405(g) did not affect this gray area between new-evidence and agency-error remands. The amendment restricted sixth-sentence new-evidence remands to cases where the new evidence was material and there was good cause for the failure to incorporate it into the record in a prior proceeding. § 307, Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (June 9, 1980). *See*, H.R. Rep. No. 96-100, 96th Cong., 1st Sess. 13 (1979) (amendment not intended to restrict any remands under sentence four).

It can be plausibly argued that many district court remands, like the one in this case, involve the "taking of new evidence." As a practical matter, even when a party proffers additional evidence to the court, the court will sometimes do a full review of the record to see whether the case can be reversed or modified without regard to the new evidence. If the court finds error in reviewing the record, there will often be a "hybrid" remand, both to correct error and to take the new evidence. *Key v. Sullivan*, 925 F.2d 1056 (7th Cir. 1991).

By contrast, there are very few remands that are purely and undeniably sixth-sentence new-evidence

remands. If an attorney brings new, previously unavailable evidence to court, either the evidence coincidentally became available during the short 60-day statute of limitations period for filing the civil action, or there must have been a colorable question of agency error even on the old record so the attorney filed the civil action before knowing about the new evidence. Claims of agency error and requests for new-evidence remands usually go together, and are hard to separate in practice.

NOSSCR requests the Court to treat both types of remand similarly so that this unproductive litigation over classification of remands can end. *Alexander v. Heckler*, 612 F. Supp. 272, 276 (D.R.I. 1985) (treat both types of remands the same procedurally, once their individual criteria are met); *see also Hensley v. Eckerhart*, 461 U.S. 424, 442 (1983) (Brennan, J., concurring in part and dissenting in part) (appeals from awards of attorney fees are one of the least socially productive types of litigation imaginable).

VII. More than one "final judgment" can be entered in a civil action.

We argue above that the district court is not required to enter a judgment at the time of a fourth-sentence remand order. Although that point is helpful to Respondent Schaefer's position, it is not necessary. Even if an appealable judgment must be entered, a later judgment, "final" for EAJA purposes, could also be entered when the litigation is truly finished.

As a general matter, "many final orders may issue" in the course of a single case, particularly where the court has granted "relief of an injunctive nature that must prove its efficacy only over a period of time." *White v.*

New Hampshire Department of Employment Security, 455 U.S. 696, 722-23 (1974) [citation omitted].

In addition, under the Federal Rules, multiple "judgments" may issue on the merits in a single case involving multiple claims, and each such judgment may be independently appealable as a final decision under 28 U.S.C. § 1291. Fed. R. Civ. P. 54(b); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1955).[7]

Under Rule 54(b), a complaint may give rise to separable claims "if 'different sorts of relief' are sought and, consequently, the claim for greater relief would be pressed even if the other claim were granted . . . When these features are present, claims may be considered separable even if they have arisen out of the same transaction or occurrence." *Cullen v. Margiotta*, 811 F.2d 698, 711 (2d Cir. 1987), *cert. denied* 483 U.S. 1021 (1987), quoting *Seatrain Shipbuilding Corp. v. Shell Oil Corp.*, 444 U.S. 572, 580-81 & n.18 (1980).

A court may issue an injunctive-type order on a claim that may be appealed as a final decision pursuant to Rule 54(b) and § 1291, while retaining jurisdiction to enter further orders with respect to either that claim or a related claim that may or may not be mooted by final disposition of the first claim. *See, e.g., Timberlake v. Oppenheimer & Co., Inc.*, 729 F.2d 515, 517 (7th Cir. 1984)

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[7] Fed. R. Civ. P. 54(b) provides in relevant part that "[w]hen more than one claim is presented in an action . . . the court may direct entry of a final judgment as to one or more but fewer than all of the claims . . . upon an express direction that there is no just reason for delay and upon an express direction for the entry of judgment." In *Melkonyan* this Court looked to Rule 54(a) in defining the term "final judgment" for EAJA purposes. 111 S.Ct. at 2161.

(order compelling arbitration is a final judgment under Section 1291 even though district court retains jurisdiction to enforce any subsequent arbitration award).

By analogy, multiple final judgments may be entered in Social Security cases if the Court holds that all fourth-sentence remands are appealable. A typical disability complaint arising under 42 U.S.C. § 405(g) effectively raises two related but distinct claims. The first seeks a remand for application of the standards required by law. The second seeks outright reversal of the Secretary's decision and a judgment that plaintiff is entitled to disability benefits as a matter of law.[8] Since § 405(g) itself vests discretion in the district court to order several remedies, and specifies no pleading requirements, any complaint brought under that statute invokes distinct claims for remand and reversal, unless narrower relief is requested in the complaint.

A request for a remand can be seen as a separate "claim" under § 405(g), distinct from the ultimate claim of entitlement to benefits. Numerous class actions have been filed pursuant to § 405(g) that sought *only* injunctive relief and rehearings for application of the proper legal standards. In such cases the claimants "neither [seek] nor [are] awarded benefits in the district court, but rather challenge[] the Secretary's failure to follow the applicable regulations," and if the district court agrees, the claimants are afforded rehearings under the corrected standards decreed by the court. *Bowen v. City of New York*, 476

[8] The complaint at issue in *Finkelstein* arguably presented *three* distinct claims: a claim for remand to correct legal errors committed in the individual case, a claim for outright entitlement to benefits, and a claim that the regulations used to deny benefits were invalid. *See* 496 U.S. at 622-24.

U.S. 467, 483, 485 (1986). Plaintiffs who obtain re-adjudications through such class actions have been held to satisfy the "prevailing party" requirement of the EAJA, because they obtained all they asked for in that action.[9]

VIII. The Secretary's grant of benefits to Mr. Schaefer on remand was a "settlement" upon which the district court could enter an order.

Under the EAJA, a "final judgment" means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). The agency's favorable rehearing decision issued following a fourth-sentence remand is an implicit "settlement" of the entitlement claim that was not decided by the court. Plaintiff can return to the district court with the Secretary's final decision on his entitlement claim, and obtain an "order of settlement" on that claim. The district court under such circumstances retains at least the limited jurisdiction to enter a final, pro forma order on plaintiff's claim of entitlement to benefits.

IX. This Court's decision in *Sullivan v. Finkelstein* did not hold that all remands under sentence four are immediately appealable as "final decisions," nor that the district court forfeits all jurisdiction at that time.

The agency wants a holding that all fourth-sentence remands are immediately appealable, and by both

[9] *See, e.g., McDonald v. Sullivan*, 884 F.2d 1468, 1475 (1st Cir. 1989) (litigation which assured "some 10,000 members of the plaintiff class . . . that their disability status would be considered or reconsidered" under the appropriate standard constituted "a significant victory"); *Pirus v. Bowen*, 869 F.2d 536, 538 (9th Cir. 1989).

parties, because the EAJA statute of limitations begins only with a final judgment that is no longer "appealable." 28 U.S.C. § 2412(d)(2)(G).

Finkelstein decided that remand orders that invalidate regulations are appealable immediately by the agency as "final decisions," but carefully narrowed its holding. *Finkelstein* expressly reserved the key question, whether claimants (or even the agency) can immediately appeal all fourth-sentence remand orders.

Finkelstein stated that "the question before us . . . is whether orders of the type entered by the District Court in this case are immediately appealable by the Secretary." 496 U.S. at 623. The court noted the great variety of remands in administrative law. "In other cases the district court may order a remand to the agency, but the person seeking judicial relief may seek to appeal on the ground that broader relief should have been granted by the district court, *e.g., Bohms v. Gardner*, 381 F.2d 283 (C.A. 8, 1967), *cert. denied*, 390 U.S. 964, 88 S.Ct. 1069, 19 L.Ed. 2d 1164 (1968). None of these situations is presented in this case, and we express no opinion about the appealability in those circumstances." *Sullivan v. Finkelstein*, 496 U.S. at 623 n.3.

Extending *Finkelstein* to make garden-variety fourth-sentence remands appealable would risk a flood of "protective" appeals and litigation over which issues had become *res judicata*. *Cf., Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 401 (5th Cir. 1984) (uncertainty causes precautionary appeals).

The general law of finality should be understood as a backdrop to *Finkelstein*. The classic statement about finality, the test of appealability, is from *Catlin v. United States*, 324 U.S. 229, 233 (1945): "A final decision generally is one

which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." This formulation suggests that the remand order in this case was not a final decision because it did not end the litigation on the merits, in any usual sense.

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of *what for practical purposes is a single controversy*, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment.

Cobbledick v. United States, 309 U.S. 323, 324-25 (1940) (Frankfurter, J.) [emphasis supplied]. Justice Frankfurter's formulation suggests non-appealability of the remand order that was entered in this case. The remand order was, for practical purposes, part of a single controversy brought to the district court by the claimant. A practical test is used.

Justice Frankfurter further wrote, "[t]he doctrine of finality is a phase of the distribution of authority within the judicial hierarchy." *Id.* at 330. Justice Frankfurter's observation is particularly useful in this case. Clearly, Congress in § 405(g) distributed the authority to the district courts rather than the courts of appeals. Allowing intermediate appeals of what are essentially interlocutory remands at the request of claimants or the agency would upset Congress's intended "distribution of authority within the judicial hierarchy."

Finkelstein used both a technical textual approach and a practical approach to the finality question. The Court

parsed § 405(g) to see whether its language could support finality for the type of remand entered in that case.

However, *Finkelstein* also went beyond the text of § 405(g), using a traditional pragmatic approach. *Finkelstein* noted that the government might never realistically have a chance to appeal what was in effect an invalidation of its regulation, and distinguished another Social Security case "which, quite unlike the present case, involved an appeal from a district court remand order that did 'no more than order clarification of the administrative decision.' " 496 U.S. at 628 n.8.

In ordinary circumstances, neither claimants nor the agency should be permitted to appeal "garden-variety" fourth-sentence remand orders. Such appeals would splinter Social Security litigation. The availability of such appeals could cause "precautionary" appeals to be filed, with litigation over which issues, not appealed, had become *res judicata*. Any mistake the district court made by remanding, instead of reversing or affirming, can be corrected on appeal at the end of the case after the remand proceedings are finished. The results of the remand proceedings may moot the appeal.

The court in *Finkelstein* also wisely reserved the question of whether judicial review after a fourth-sentence remand must be in a separate civil action, or can be in a new phase of the same civil action. *Finkelstein* stated that judicial review after a fourth-sentence remand is by a "separate piece of litigation," 496 U.S. at 625. "Separate piece of litigation" in the context of *Finkelstein* means a separate piece of litigation *for appealability purposes*. If the Court had meant "separate civil action," the Court would have said it.

Unless district courts have jurisdiction to enter "final judgments" after fourth-sentence remands, claimants will be forced to file second civil actions if they need additional judicial review. The "second civil action" theory would unnecessarily multiply litigation and paperwork, and would create vexing litigation over the timeliness of filing the second action. It would entwine the jurisdiction of the first judge to enforce the remand order with the jurisdiction of the second judge to hear the new challenge. "[T]he court that issues a mandate is normally the best judge of its content." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940).

Continuing jurisdiction in the same civil action is a necessary protection, given this agency's history of reluctant compliance with some court remand orders. *See* Section IV of this brief, above.

Historically the courts and the agency have rejected the "second civil action" theory. *Wilson*, 609 F. Supp. 120; *Brown*, 747 F.2d at 884. Now the agency has flip-flopped, apparently in hopes of finding a way around this Court's decision in *Sullivan v. Hudson* by prematurely ending the civil action for which EAJA fees may be paid.

The Eighth Circuit correctly rejected the agency's fee-driven attempt to splinter Social Security litigation.

CONCLUSION

We request the Court to affirm the Eighth Circuit's finding that the EAJA fee application in this case was timely. Further, we request the Court to clarify that district courts retain jurisdiction during all non-dispositive remands, that non-dispositive remands are not ordinarily immediately appealable, and that claimants do not need to file second civil actions if they are still denied benefits after court remands.

Respectfully submitted,

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STATUTORY APPENDIX

42 U.S.C. § 405(g) [sentence numbering in brackets supplied]:

Judicial review. [1] Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. [2] Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. [3] As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. [4] The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. [5] The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a)

hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. [6] The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. [7] Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. [8] The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. [9] Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 U.S.C. § 406(b):

(1) Whenever a court renders a judgment favorable to a claimant under this title who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of

the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 205(i) [42 USCS § 405(i)], certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) of this subsection is applicable any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

No. 92-311

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In The

Supreme Court of the United States

October Term, 1992

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* LEGAL SERVICES OF NORTHERN CALIFORNIA, INC., AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF RESPONDENT

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No. 92-311

In The

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To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF *AMICI CURIAE* LEGAL SERVICES OF NORTHERN CALIFORNIA, INC., AND NATIONAL SENIOR CITIZENS LAW CENTER IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI*

This brief is filed, with the consent of the parties, on behalf of Legal Services of Northern California, Inc. (LSNC) and the National Senior Citizens Law Center (NSCLC). Legal Services of Northern California, Inc. is a non-profit agency providing free civil legal services to low income residents of northern California in the areas of civil rights, health, housing, and public benefits.

National Senior Citizens Law Center is a non-profit agency specializing in legal issues affecting the elderly

poor. NSCLC practices law in support of legal services programs on behalf of elderly poor clients and client groups. As a nationwide support center, NSCLC assists attorneys in field programs funded by the Legal Services Corporation or the Administration on Aging. Substantive areas of practice include Social Security and Supplemental Security Income, Medicare, Medicaid, nursing home and home care issues, pensions, and age discrimination.

Over the years LSNC and NSCLC have represented thousands of poor persons, and have appeared a number of times before this Court, with respect to a wide variety of issues arising under Titles II and XVI of the Social Security Act. In addition, both LSNC and NSCLC provide counselling and assistance to members of the private bar who represent low-income persons in disability appeals. LSNC, in particular, refers numerous low-income claimants for disability benefits to members of the private disability bar for representation, pursuant to its obligation as a legal services organization to encourage private bar involvement in the provision of legal assistance to low-income persons. *See* 45 C.F.R. § 1614.2. Often the only potential source of adequate compensation for these advocates, especially where the claim for benefits arises under the Supplemental Security Income program, is through the Equal Access to Justice Act (EAJA).[1] The radical interpretation urged by the Secretary of Health

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[1] LSNC and NSCLC also have developed considerable expertise in litigating EAJA issues, particularly in the context of cases arising under the Social Security Act. Counsel for *amici* have lodged an extensive *amicus* brief in the case of *Engelbrite v. Sullivan*, No. 91-16920 (9th Cir.), which the Secretary has identified as raising the same issues as are presented in this case. Pet. Br. at 20 n.13.

and Human Services of this Court's recent series of decisions implicating the availability of EAJA fees under the Social Security Act would drastically limit a disability claimant's entitlement to EAJA fees in most cases, and would significantly impair the ability of *amici* to assist poor, often destitute clients seeking to challenge the wrongful denial of disability benefits.

The Secretary's position in this case calls into question the ability of hundreds of non-profit legal services organizations like *amici* to recover EAJA fees for the extensive post-litigation administrative advocacy necessary to successfully resolve the vast majority of disability appeals now remanded by the district courts. Equally significant would be the impact of the Secretary's position upon the efforts of *amici* and similar organizations to assist thousands of needy disabled clients through referrals to private attorneys who, until recently, were willing to undertake such representation primarily because of the potential for eventual compensation under the EAJA. *Amici* therefore are filing this brief to present the issues from the perspective of those individuals most in need of the level playing field Congress intended the EAJA to create for claimants compelled to vindicate meritorious applications for disability benefits through litigation against the federal government.

STATEMENT OF THE ISSUE

Less than four years ago this Court, in the context of a typical disability benefits appeal remanded by the district court pursuant to 42 U.S.C. § 405(g) for correction of legal errors committed by the Secretary, made the undisputed observation that jurisdiction routinely is retained

over such a case, pending conclusion of the administrative proceedings on remand, in order to entertain a post-remand application for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). The Court went on to hold that in such an application the plaintiff may seek compensation for counsel's time incurred in both the litigation and the administrative proceedings on remand. *Sullivan v. Hudson*, 490 U.S. 877, 885-90 (1989). This holding made eminent sense in light of the Court's recognition that, as a general matter, a disability claimant who obtains a judicial remand for further proceedings does not qualify as a "prevailing party," for purposes of EAJA entitlement under 28 U.S.C. § 2412(d)(1)(A), until after he or she has won a final administrative award of benefits. *Id.* at 886-87.

A year later, in distinguishing between the "finality" of remands ordered pursuant to the fourth and sixth sentences of § 405(g) for purposes of the Secretary's ability to obtain immediate appellate review, the Court reaffirmed its conclusion in *Hudson* that

> [t]he purpose of the EAJA [is] to counterbalance the financial disincentives to vindicating rights against the Government through litigation; given this purpose, we could not believe that Congress would "throw the Social Security claimant a lifeline it knew was a foot short" by denying her attorney's fees for the mandatory proceedings on remand.

Sullivan v. Finkelstein, 496 U.S. 617, 630 (1990), quoting *Hudson*, 490 U.S. at 890.

Finally, just eighteen months ago, in determining that the "final judgment" triggering the thirty day limitations period for EAJA fee applications in § 405(g) cases must be a judgment entered by a court, and not an administrative

decision, the Court emphasized that "[o]ur decision in *Sullivan v. Hudson* is not to the contrary." *Melkonyan v. Sullivan*, 111 S.Ct. 2157, 2162 (1991). However, the Court then moved beyond its narrow holding on the statutory definition of "final judgment," and included a discussion which at least implied that in so-called "sentence four" remands (i.e., those remands ordered for correction of legal error, such as the one at issue in *Hudson*), the EAJA filing period may begin to run ninety days after issuance of the remand order, long before the administrative proceedings on remand are completed. *Id.* at 2165.

Wielding this single *dictum* in a nation-wide effort to bar, as untimely, the post-remand EAJA applications submitted by the hundreds of disabled claimants who obtained fourth sentence remands prior to the *Melkonyan* decision, the Secretary has touched off an unprecedented avalanche of fee litigation in the lower federal courts. Yet these courts, which review disability claims and attendant EAJA applications virtually on a daily basis, from a unique perspective informed by their extraordinary degree of "direct interaction" with the administrative agency (*Hudson*, 490 U.S. at 885), have rejected the Secretary's position in overwhelming numbers. In so doing they have heeded the admonition of Congress not to construe the procedural requirements of the EAJA in an "overly technical" manner, so as to spring "a trap for the unwary resulting in the unwarranted denial of fees." H.R.Rep. No. 120, 99th Cong., 1st Sess. 18 n.26, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 146 n.26.[2]

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[2] As far as *amici* are aware, every Court of Appeals to consider the issue has rejected the Secretary's *Melkonyan*-related effort to bar, as untimely, the post-remand EAJA application of a

The torrent of EAJA litigation unleashed by the Secretary's largely unavailing efforts to persuade the courts that an EAJA application must be filed within ninety days of an unappealed fourth sentence remand order, notwithstanding the plaintiff's inability at that time to demonstrate the requisite "prevailing party" status for EAJA entitlement, thus far has arisen primarily in the context of cases such as this one, where the remand was ordered *prior* to the decision in *Melkonyan*. In these cases the Secretary's singular lack of success in denying disability claimants their attorney's fees, simply because prior to *Melkonyan* they faithfully and timely adhered to the prevailing rules governing the timing of EAJA applications in fourth sentence remand contexts, is no doubt driven in part by the judiciary's simple refusal to countenance such a patently unjust result.[3] This nearly universal rejection of the Secretary's positions rests, as one district judge put it, "on the largely unspoken assumption that [in *Melkonyan*] the Supreme Court could not have intended the result it apparently dictated, particularly since this result frustrates the very purpose of [the] EAJA."[4]

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disability plaintiff whose case was remanded prior to *Melkonyan*. *See infra* App. 1a (listing cases). For two particularly thorough discussions, *see Labrie v. Sec'y of HHS*, 976 F.2d 779 (1st Cir. 1992), and *Hafner v. Sullivan*, 972 F.2d 249 (8th Cir. 1992).

[3] Set forth *infra* App. 2a-4a are forty-nine published decisions of the district courts, arranged according to the various analyses they have employed in rejecting the Secretary's *Melkonyan*-related arguments raised in connection with plaintiff's entitlement to attorney's fees under the EAJA. The four published contrary decisions (of which *amici* are aware) adopting the Secretary's position are listed at *infra* App. 5a.

[4] *Phayboun v. Sullivan*, No. S-90-225 EJG/PAN (E.D.Cal. Sept. 4, 1992) (unpublished), at 15. The unpublished decisions of

The raw unfairness resulting from the Secretary's effort to retroactively impose his calculation of the appropriate EAJA filing period upon cases involving pre-*Melkonyan* fourth sentence remands has thus far focussed judicial attention upon that category of cases. However, the Secretary correctly recognizes that "the number of such [cases] will diminish rapidly in the near future," as the last of the pre-*Melkonyan* cases meander their way through the inexorable internal processes of the Social Security Administration. Pet. Br. at 30 n.18. Accordingly, the Secretary asserts that his interpretation of *Finkelstein* and *Melkonyan*, which requires the filing of an EAJA application within ninety days of all unappealed fourth sentence remands, will provide a "clear rule" to benefit not only the district courts but the "thousands of litigants" who will encounter this timeliness issue in the future. Pet. Br. at 30.

Notwithstanding the Secretary's professed concern for these "thousands" of disabled persons whose claims he will wrongly deny, he certainly has not initiated litigation over this issue across the nation simply to establish a bright line governing the timing of EAJA applications, particularly since the line drawn by the Court in *Hudson* is perfectly clear, and has the added benefit of directing a result which comports with common sense. The Secretary's true interest in this case is in fact far more tangible

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the district courts rejecting the Secretary's timeliness arguments are legion, and certainly no less extensive (or creative) in their analyses than their published counterparts. For example, the unpublished memorandum decision in *Phayboun v. Sullivan* was forty-three pages in length. Copies of all unpublished decisions referenced in this brief have been lodged with the Clerk and served on the parties.

than the establishment of a definitive EAJA application procedure. Although that interest lies, for the most part, obscured within his measured arguments, it surfaces unadorned in this single sentence within his brief: "In short, *Finkelstein* and *Melkonyan* necessarily limit *Hudson* to cases remanded pursuant to sentence six." Pet. Br. at 25.

This single sentence reveals what the Secretary's position in this case is really about: money. If this Court's holding in *Hudson* allowing EAJA compensation for time expended in post-remand administrative proceedings is limited to sentence six remands, then *Hudson* will become an empty shell, and no more than a handful of the thousands of disabled persons who annually overturn the wrongful denial of their claims, with the assistance of a remand from the federal court, may possibly hope to recover EAJA fees for the substantial time incurred in the laborious post-remand proceedings. Indeed, the acceptance of the Secretary's position will foreclose EAJA entitlement in the very cases where fee awards are most appropriate, i.e., in those not infrequent cases where, following an initial fourth sentence remand, the unreasonable and often obdurate conduct of the agency necessitates years of multiple post-remand hearings, rehearings, and subsequent litigation in which the claimant is bounced between various administrative and judicial review levels as if, in the words of one district court, the agency was engaged in a "ping-pong" match.[5]

Finally, and most disturbing, this Court's endorsement of the Secretary's position would undoubtedly

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[5] *Rodriguez v. Secretary of HHS*, 794 F.Supp. 58, 59 (D.Puerto Rico 1992); *see infra* at 25 & n.19.

cause a significant reduction in the number of attorneys willing to undertake federal court representation of disability claimants, in light of counsel's inability to obtain EAJA compensation for the extensive proceedings on remand which almost invariably are required to secure a final award of benefits. Even worse is the fact that those persons most in need of competent representation to vindicate their disability claims under Title XVI of the Social Security Act (the SSI program), who by definition are needy and seeking only a subsistence level income, will suffer the most if the Secretary's agenda for vitiating *Hudson* is adopted, because those (already few) attorneys willing to represent such claimants have no effective incentive to do so apart from the possibility of EAJA fees.

The Secretary has seized the opportunity arising from the confusion generated by *Melkonyan*'s discussion of EAJA *procedure* to try and score a stunning *substantive* EAJA victory, through a decision which would excise the very heart of this Court's holding in *Hudson*. The Secretary's invitation to nullify *Hudson* would turn the EAJA on its head, and should be resoundingly refused.

SUMMARY OF ARGUMENT

a. The extended analysis of this Court in *Sullivan v. Hudson*, 490 U.S. 877 (1989), sensibly recognized that in cases remanded pursuant to 42 U.S.C. § 405(g) for correction of legal error committed by the Secretary in evaluating plaintiff's claim, the "final judgment" triggering the filing period for a fee application under the EAJA cannot be entered until after the administrative proceedings on remand have been completed. This must be so because the standard described in *Hudson* for qualification as a

"prevailing party" under the EAJA, to which the Secretary still adheres, cannot be met until after the administrative proceedings on remand have been completed. Respondent in this case complied with the procedure approved in *Hudson*, and which had been endorsed by the Secretary both in litigation and regulatory comment, by returning to the district court for entry of a post-remand judgment to confirm his entitlement to benefits.

b. This Court's decisions in *Finkelstein v. Sullivan*, 496 U.S. 617 (1990), and *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991), were not intended, as the Secretary now argues, to severely limit the substantive scope of the EAJA, and to effectively nullify the substantive holding in *Hudson*, by requiring claimants in the vast majority of cases remanded under § 405(g) to file fee applications *before* their threshold qualifications for EAJA entitlement are established. Reaffirmation of the EAJA filing period delineated in *Hudson* will disturb neither the Court's holding in *Finkelstein*, which simply permitted the Secretary to immediately appeal an order remanding the case for correction of legal and factual errors, nor the Court's holding in *Melkonyan*, which established that the EAJA "final judgment" described in 28 U.S.C. § 2412(d)(1)(B) requires a judgment filed by the court, and not the administrative agency.

c. The EAJA filing procedure suggested by the Secretary is grossly inefficient and would needlessly waste the resources of litigants and courts alike. Its principle intent is to substantively vitiate the Court's decision in *Hudson*, which construed the EAJA to permit attorney's fees awards for the considerable time required of counsel

in the mandatory post-remand administrative proceedings which are necessary to establish the entitlement to benefits. Even if the Secretary's interpretation of the appropriate timeframe for the filing of an EAJA application following a fourth sentence remand order is correct, the scope of the Court's substantive holding in *Hudson* is undiminished. Acceptance of the Secretary's invitation to nullify *Hudson* will turn the EAJA on its head, and ensure that many needy and disabled persons, whose applications for benefits are wrongly denied by the Secretary, will never be able to vindicate their claims.

ARGUMENT

I. RESPONDENT'S APPLICATION FOR ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT WAS TIMELY FILED

A. The EAJA filing period may only be triggered by a district court judgment entered after the claimant has won entitlement to benefits

In *Sullivan v. Hudson*, 490 U.S. 877 (1989), the Court had before it a typical claim arising under 42 U.S.C. § 405(g) for judicial review of the administrative denial of disability benefits. In that case the district court had affirmed the Secretary's denial of benefits, but the Court of Appeals reversed the decision of the district court, vacated the Secretary's administrative denial, and instructed the lower court to remand the claim for further administrative proceedings necessary to correct a number of legal errors committed by the Secretary in evaluating plaintiff's claim. *Id.* at 880-81. Pursuant to the district court's remand order, the Secretary re-evaluated plaintiff's claim under the standards required by law, and granted the application for benefits. *Id.* at 881.

Following issuance of the final administrative decision awarding benefits on remand, the Secretary advised the district court of plaintiff's final administrative victory on remand, and obtained an order dismissing plaintiff's claim for judicial review. *Id.* at 882. Notwithstanding its dismissal order, the district court, as this Court noted, "retained jurisdiction over the action for the limited purpose of considering any petition for the award of attorney's fees." *Hudson*, 490 U.S. at 882.

The plaintiff then filed a petition for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), which the district court denied because in its view the Secretary's position had been "substantially justified" within the meaning of § 2412(d)(1)(A). *Id.* at 882. However, the Court of Appeals reversed the district court's substantial justification ruling, and held in addition that the EAJA permits an award of fees for time incurred in the post-remand administrative proceedings as well as in the litigation itself. *See* 490 U.S. at 882-83. It was with respect to this latter holding that the Court granted the Secretary's petition for certiorari. 490 U.S. at 883.

The task before this Court in *Hudson* was to determine "the most reasonable interpretation of the [EAJA] in light of its manifest intent." 490 U.S. at 889. That intent, held the Court, is "to diminish the deterrent effect of seeking review of, or defending against, governmental action," 490 U.S. at 890 (citation omitted), and to reduce the number of persons who, due to the prohibitive costs of litigation against the government, are forced "to endure an injustice [rather] than to contest it." 490 U.S. at 883, quoting S.Rep. No. 96-253, p. 5 (1979).

In interpreting whether the post-remand administrative proceedings were to be considered part of the civil

"action" for EAJA purposes under 28 U.S.C. § 2412(d)(1)(A), the Court necessarily engaged in a detailed examination of the "somewhat unusual" judicial review provisions under § 405(g), which provide "a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act." 490 U.S. at 885. In particular, in cases like *Hudson* itself, where "the Secretary has committed a legal or factual error in evaluating a particular claim," the district court's remand order will often instruct the Secretary to address "complex legal issues" on remand. *Ibid.* The Court observed that "[d]eviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review," and accordingly the district court retains jurisdiction over such cases "to assure that its prior mandate is effectuated." *Id.* at 886.

After laying the foundation of these universally acknowledged jurisdictional principles applicable to a disability claim remanded for legal error under § 405(g), replete with numerous circuit court citations dating to 1967, this Court then highlighted the "[t]wo points important to the application of the EAJA" in § 405(g) cases:

> First, in a case such as this one, where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain 'prevailing party status' within the meaning of § 2412(d)(1)(A) until after the results

> of the administrative proceedings on remand are known.

490 U.S. at 886[6]

Second, because "the remanding court continues to retain jurisdiction over the action within the meaning of the EAJA and may exercise that jurisdiction to determine if its legal instructions on remand have been followed by the Secretary," there often will be no "final judgment" triggering the day EAJA application period, 28 U.S.C. 2412(d)(1)(B), "until the administrative proceedings on remand are complete." 490 U.S. at 887-88.

Significantly, for purposes of evaluating the Secretary's current position on these matters, it bears emphasis that *none* of the above-described propositions set forth in *Hudson* were disputed by the Secretary. Indeed, as this Court specifically noted, "[t]he Secretary concedes that a remand order from the district court to the agency is not a final determination of the civil action and that the district court retains jurisdiction to review any determination rendered on remand." 490 U.S. at 887 (quotation from Secretary's brief omitted).[7]

Finally turning to the specific question presented in *Hudson*, the Court observed that

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[6] The Court noted that the prerequisite of an administrative award of benefits for qualification as an EAJA "prevailing party" in a § 405(g) case was in accord with "the vast majority" of the circuit court holdings on the issue. 490 U.S. at 887.

[7] The Secretary's return to the district court to obtain a final dispositive order following the post-remand award of benefits in *Hudson* was simply consistent with the procedure he had agreed was appropriate in *all* remanded cases, including those remanded for the correction of legal error. *See Brown v. Secretary of HHS*, 747 F.2d 878, 884 (3d Cir. 1984); 54 Fed.Reg. 37,789, 37,791 (1989).

> [g]iven the "mandatory" nature of the administrative proceedings at issue here, and their close relation in law and fact to the issues before the district court on judicial review, we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline it knew was a foot short . . . Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA, Congress cannot lightly be assumed to have intended it.

490 U.S. at 889-90 (citations omitted). Accordingly, the Court held that the administrative proceedings on remand in a § 405(g) case constitute a sufficient part of the civil "action" described in 28 U.S.C. § 2412(d)(1)(A) to permit an award of EAJA fees for services performed on remand before the Social Security Administration. *Id.* at 890.

B. The Court's decisions in *Finkelstein* and *Melkonyan* do not require abandonment of the precedure approved in *Hudson*

In *Hudson* neither this Court nor the Secretary had any doubt whatsoever that, in a routine case remanded under § 405(g) for correction of legal or factual errors committed by the Secretary, claimant's petition for EAJA fees could not be filed or entertained until *after* (1) receipt of an administrative award of benefits on remand, and (2) entry of a "final judgment" acknowledging the favorable administrative decision. Yet in his eagerness to overturn *Hudson*'s ruling on the *substantive* scope of the EAJA, the Secretary has no qualms in abandoning these fundamental principles of EAJA *procedure* he had endorsed without question in *Hudson*. This Court's recent decisions in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990) and *Melkonyan v.*

Sullivan, 111 S.Ct. 2157 (1991) have prompted the Secretary to discard the post-remand EAJA filing period delineated by *Hudson*, notwithstanding express language in both opinions disavowing inconsistency with *Hudson*. *See Finkelstein*, 496 U.S. at 629-30; *Melkonyan*, 111 S.Ct. at 2162.

The Secretary's most current reading of these decisions leads him to contend that a claimant whose disability case is remanded for correction of legal errors must file his or her EAJA application for attorney's fees within thirty days of the expiration of the period for appeal of the remand order. Pet. Br. at 26. However, at that point such a claimant will not yet have obtained a final administrative award of benefits on remand, and thus cannot satisfy the "prevailing party" criterion described in *Hudson*.[8] Since the "prevailing party" analysis is the one aspect of *Hudson* which the Secretary cannot afford to jettison, *see infra* at 21, he responds to this dilemma with a non-sequitur: the claimant must allege that he is a prevailing party before the "definitive determination" of "full prevailing party status" can be made. Pet. Br. at 26-27. Although in the Secretary's novel scheme this two-step prevailing party inquiry necessarily cannot be completed until "later," Pet. Br. at 27, the precise details of the procedure are left unexplained.[9]

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[8] *See Fergason v. Sullivan*, 771 F.Supp. 1008, 1013 (W.D.Mo. 1991), citing Social Security Administration statistics indicating that it takes an average of 10.1 months to secure an Administrative Law Judge's decision following a rehearing held pursuant to a court-ordered remand.

[9] The Secretary's initial strategy in response to claimants who, after *Melkonyan*, protectively filed EAJA applications within ninety days of a fourth sentence remand order, was to oppose the application for inability to demonstrate prevailing party status at that time. If that opposition proved successful, and the claimant subsequently filed an EAJA application following a favorable administrative decision on remand, the Secretary would oppose *that* application as untimely. The district courts did not, by and large, find this strategy acceptable. *See, e.g., Prasad v. Sullivan*, No. C-90-1435 SC (N.D.Cal.Nov. 21, 1991) (unpublished), at 3 ("The Secretary is engaging in petty games which needlessly drain its own, and this court's, resources . . . The logical result of the Secretary's position . . . is contrary to the EAJA itself, and the Congressional intent which underlies it.")

For the reasons explained at length by respondent, *amici* fully agree that the only sensible way to harmonize this Court's precedent with the structure and intent of both the EAJA and § 405(g) is to identify the triggering event for the EAJA filing period as the dispositive district court judgment entered subsequent to a final administrative award of benefits obtained following a remand for the correction of legal or factual error. *See, e.g., Labrie v. Sec'y of HHS*, 976 F.2d 779, 785-86 (1st Cir. 1992); *Hafner v. Sullivan*, 972 F.2d 249, 250-51 (8th Cir. 1992).

With respect to the Secretary's insistence that *Finkelstein* and *Melkonyan* foreclose such a result, *amici* will make only a few brief points. First, the issue in *Melkonyan* was merely whether the triggering EAJA "judgment" is a document issued by a court or by the Social Security Administration. 111 S.Ct. at 2159. *Melkonyan* did not involve, as *Hudson* did, a remand ordered for the correction of legal error (a so-called fourth sentence remand), and there is no indication that the substantive ramifications of the Court's discussion, in *dicta*, of the appropriate EAJA filing period in such cases were raised or considered by the Court.

Second, it should be emphasized that the Court's decision in *Finkelstein*, which first drew the distinction

between sixth sentence "new evidence" remands and fourth sentence "legal error" remands, carefully distinguished its analysis of the "finality" of a fourth sentence remand order for purposes of appellate jurisdiction under 28 U.S.C. § 1291, from any interpretation of "finality" for EAJA purposes. 456 U.S. at 629 n.8. Furthermore, the Court did *not* decide whether a fourth sentence remand order constituted a final and appealable decision for the *claimant*: "The question before us is whether orders of the type entered by the District Court in this case are immediately appealable *by the Secretary*." *See* 496 U.S. at 673 & n.3 (emphasis supplied). If a fourth sentence remand does not constitute a "final decision" under § 1291 from which the *claimant* may take an appeal, it obviously cannot constitute a "final judgment" for EAJA purposes as well. The Court's primary concern in *Finkelstein* was thus to assure the *Secretary* of an opportunity for immediate review of an adverse decision which, like the decision at issue therein, effectively invalidated regulatory or statutory provisions of general applicability in disability cases. *See* 496 U.S. at 623.

Amici submit that the policies underlying the holdings of both *Finkelstein* and *Melkonyan* will be undisturbed by reaffirming the propriety of the EAJA filing period described in *Hudson* for cases remanded for the correction of legal error committed by the Secretary. The respondent's application for EAJA attorney's fees in this case was timely filed.

C. The Secretary's proposed EAJA application procedure in fourth sentence remand cases is contrary to the statutory prescription for the application, and will needlessly waste vast resources of disability claimants and the courts

As set forth *supra* at 16 & n.9, the Secretary has, after some initial experimentation, decided that in cases remanded for the correction of legal error, the claimant must file an EAJA application within ninety days of the remand order, long *before* she or he (1) qualifies as a "prevailing party" under the standard set forth in *Hudson*, and (2) can fully assess whether or not the position of the Secretary has been "substantially justified" within the meaning of 28 U.S.C. § 2412(d)(1)(A). Pet. Br. at 25-26. However, § 2412(d)(2)(B) requires that *all* EAJA applications "show" that the party seeking fees is a prevailing party and "allege" that the position of the United States was not substantially justified. In prescribing these requirements, Congress could not have intended that litigants seeking EAJA fees attest to entitlement preconditions which in fact have not been met. *See Parsons v. Sullivan*, 140 F.R.D. 352, 358 (S.D.Ohio 1992) (Secretary's proposal "would require a party to file a petition which could not possibly comply with the statutory mandate.").[10]

In addition, the Secretary's procedure will needlessly waste vast litigation resources and "senselessly clutter[] court dockets" with protective fee "applications" filed in thousands of cases which the plaintiff does not even win. *See Hafner v. Sullivan*, 972 F.2d at 249-50. For example, in

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[10] The execution of such an application arguably would constitute a violation of counsel's warranty that the representations contained therein were "well grounded in fact" pursuant to Fed.R.Civ.P. 11.

38% of the 4343 cases remanded by the district courts for further administrative proceedings in 1990, the claimant failed to obtain a favorable decision on remand. Social Security Administration, *Annual Report to Congress* 38 (Apr. 1992). *Amici* estimate that well over 90% of all § 405(g) remands must be characterized as fourth sentence remands. *See infra* at 23. Since ethical counsel *must* apply for EAJA fees in order to minimize their client's attorney fee costs, the Secretary's regime will cause thousands of fee applications to be filed by claimants who obtain fourth sentence remands but never are awarded benefits.[11] Even for those claimants who do obtain a favorable decision on remand, the Secretary's procedure will require additional, as yet undescribed post-remand filings to confirm the achievement of "full prevailing party status", Pet. Br. at 28, and to claim additional compensation for time incurred in the administrative proceedings on remand.

In short, the procedure outlined by the Secretary is absurd, which may explain why, as the First Circuit has observed, it "has gained no judicial adherents." *Labrie*,

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[11] 42 U.S.C. § 406(b) permits an award of fees to be withheld directly from a claimant's disability insurance benefits, not to exceed 25% of the past due amount, in order to effectuate an appropriate contractual agreement between the claimant and counsel. *See Bowen v. Galbreath*, 485 U.S. 74 (1988). If fees are also awarded under the EAJA, counsel must refund the lesser of the two awards to the claimant, in order to minimize the claimant's out-of-pocket fees costs. *See* Pub. L. No. 99-80, § 3 (1988), 99 Stat. 186 (28 U.S.C. § 2412 note); *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991). It has been held that counsel who intend to apply for fees under § 406 *must* first seek EAJA fees, or provide detailed notice to their clients and the court of the reasons for not filing an EAJA application. *Taylor v. Heckler*, 608 F.Supp. 1255, 1259-61 (D.N.J. 1985).

976 F.2d at 785 n.17 (further citations omitted).[12] Its unworkable awkwardness derives from the Secretary's desire to use the procedural discussion in *Melkonyan* to preclude EAJA compensation for the administrative proceedings which necessarily follow a fourth sentence remand, but to avoid at all costs the logical corollary to his theory, which is that in light of *Melkonyan* the issuance of a fourth sentence remand alone is sufficient to confer prevailing party status under the EAJA.[13] Thus the Secretary's agenda for *substantive* EAJA limitation has yielded a counterintuitive and grossly inefficient theory of EAJA *procedure*, which Congress could not possibly have intended in fashioning this statute.

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[12] Judicial hostility to the Secretary's scheme can hardly be exaggerated. *See, e.g., Parsons*, 140 F.R.D. at 358. *Amici* are aware of cases where the claimant and Secretary have *stipulated* that a fee petition filed pursuant to the Secretary's timeline in a fourth sentence remand should be held in abeyance, pending conclusion of the proceedings on remand, and the court has refused to honor the stipulation. *See Xiong v. Sullivan*, No. CIV-S-91-0860 DFL GGH (E.D.Cal. Feb. 2, 1993) (Magistrate Judge's recommendation) (unpublished) at 3-4.

[13] A growing number of district courts have so held. *See, e.g., Gagnon v. Sullivan*, 792 F.Supp. 873, 874 (D.Me. 1992); *Thomas for Brown v. Sullivan*, 785 F.Supp. 788, 792 (C.D.Ill. 1992); *Rollins v. Sullivan*, 784 F.Supp. 253, 254, 258 (E.D.Pa. 1992); *Spurlock v. Sullivan*, 783 F.Supp. 474, 479 (N.D.Cal. 1992); *Mills v. Sullivan*, 782 F.Supp. 1347, 1349 (W.D.Mo. 1992); *Lopez v. Sullivan*, 780 F.Supp. 496, 502 (N.D.Ill. 1991); *Sesker v. Sullivan*, 779 F.Supp. 1042, 1044 (W.D.Mo. 1991); *Audette v. Sec'y of HHS*, 776 F.Supp. 84, 91 (D.R.I. 1991); *Dow v. Sullivan*, 774 F.Supp. 46, 48-49 (D.Me. 1991).

II. EVEN IF THE SECRETARY'S INTERPRETATION OF THE APPROPRIATE FILING PERIOD FOR EAJA APPLICATIONS IN CASES INVOLVING FOURTH SENTENCE REMANDS IS CORRECT, THE COURT'S HOLDING IN *HUDSON* CANNOT BE LIMITED TO SIXTH SENTENCE REMANDS

The two types of remand orders authorized by § 405(g) are those in which the court rules in some way "as to the correctness of the administrative determination" (i.e., a "fourth sentence" remand), and those in which the court does *not* make any substantive ruling, but rather "remands because new evidence has come to light that was not available to the claimant at the time of the administrative proceeding and that evidence may have changed the outcome of the prior proceeding" (i.e., a "sixth sentence" remand). *Melkonyan*, 111 S.Ct. at 2163.[14] It is undisputed that *Hudson* involved a fourth sentence remand ordered to correct legal errors committed by the Secretary in evaluating plaintiff's disability claim. 490 U.S. at 880-81; *Labrie*, 976 F.2d at 783 n.8; Pet. Br. at 24.

Neither the specific holding interpreting the underlying intent of the EAJA in *Hudson*, nor any of its supporting analysis, make any sense whatsoever outside the context of a case remanded because the Secretary has wrongly evaluated and denied a disability claim. All of *Hudson*'s (undisputed) observations regarding the district court's continuing oversight of the post-remand administrative proceedings, and of counsel's necessary role in

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[14] A "subcategory" of sentence six permits a remand "on motion of the Secretary for good cause shown before he files his answer." *Melkonyan*, 111 S.Ct. at 2163, quoting § 405(g). No substantive ruling presumably would be issued by the Court in conjunction with such a remand.

those proceedings "both to ensure compliance with the district court's order . . . and to prepare for any further proceedings before the district court to verify such compliance," assumed a predicate finding "that the Secretary has committed a legal or factual error in evaluating a particular claim." 490 U.S. at 889, 887.

Although he does not highlight the consequences of his contention that "*Finkelstein* and *Melkonyan* necessarily limit *Hudson* to cases remanded pursuant to sentence six," Pet. Br. at 25, it presumably has not been lost on the Secretary that such a "limitation" would in fact reduce the number of claimants who would qualify for post-remand attorney's fees to nearly zero, for two reasons.

First, in *amici*'s experience, the percentage of remands which comply with the "good cause" and "material new evidence" standards of sentence six is extremely small, and certainly less than 10%.[15] In addition, in *amici*'s experience the Secretary rarely exercises his independent prerogative under sentence six to seek a remand, for good cause, *prior* to the filing of his answer, as required by § 405(g).[16]

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[15] The regulations themselves provide ample opportunity for the submission or obtaining of "new and material" evidence *prior* to issuance of the Secretary's final administrative decision. *See, e.g.*, 20 C.F.R. § 404.976(b). Common sense suggests that the number of cases in which *more* "new" evidence (relating back in time to the period of disability alleged by the claimant) is discovered *after* the final administrative denial, must be extremely small.

[16] To the contrary, the Secretary has represented in litigation that typically his counsel are unable to consider the propriety of a remand until *after* the administrative record, which must be filed in conjunction with the Secretary's answer pursuant to § 405(g), is compiled and reviewed. *Spurlock v. Sullivan*, 790 F.Supp. 779, 982 (N.D.Cal. 1992).

Second, although the entire universe of true sentence six remands is thus a tiny one, its subset of cases in which a claimant might actually be awarded EAJA fees is infinitely smaller still.[17] It is difficult to imagine how a claimant who obtains a post-remand award of benefits, based on evidence which by definition was not available at the time of the initial decision, will ever be able to demonstrate that the Secretary's position in originally denying the claim was "not substantially justified" within the meaning of § 2412(d)(1)(A). The lower courts typically have refused to find an initial administrative denial to be without substantial justification, where the subsequent favorable decision on remand relied on evidence or claims not raised by the plaintiff in the original proceeding.[18]

As *Hudson* acknowledged, the EAJA was intended to encourage judicial review of governmental action which has caused "injustice." 490 U.S. at 883, quoting S.Rep. No. 96-253, p. 5 (1979). In the disability context, such injustices arise not in the context of the few exceptional cases which qualify for sixth sentence remands, but in those

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[17] In the wake of *Melkonyan*, a number of district courts sought to avoid the unjust result dictated by the Secretary's timeliness arguments by construing the pre-*Melkonyan* remand order as a "sixth sentence" remand. *See infra* App. 3a. Although in fact few if any of those orders actually met the prerequisites for a sentence six remand, some of the linguistic endeavors of those courts which held to the contrary were truly heroic. *See, e.g., Rivera-Sanchez v. Sec'y of HHS*, 786 F.Supp. 147, 148-149 (D.Puerto Rico 1992) ("plausible to view the Secretary's motion to remand as a hybrid sentence six remand/request sentence six subcategory request").

[18] *See, e.g., Reeves v. Bowen*, 841 F.2d 383, 385 (11th Cir. 1988); *Rosado v. Bowen*, 823 F.2d 40, 43 (2d Cir. 1987); *Desrouchers v. Heckler*, 701 F.Supp. 753, 757 (D.Nev. 1988).

numerous claims, all too familiar to the district courts which review them, where the Secretary's unreasonable and unlawful conduct has required years of multiple administrative and judicial proceedings to finally establish that in fact the claimant had been disabled and entitled to benefits all along.[19] In his attempt to evade liability for the substantial litigation costs incurred by hundreds of such disabled claimants as a direct result of his unreasonable denial of their benefit application, the Secretary now seeks to effectively sever the EAJA "lifeline" which Congress extended in the hope that at least some of these wrongs will be remedied by competent representation in an action for federal court review under § 405(g).

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[19] *See, e.g., Defrancesco v. Sullivan*, 803 F.Supp. 1332, 1337 (N.D.Ill. 1992) (two district court decisions, one circuit court decision, and various administrative appeals, all caused by position of Secretary which was "inconsistent, illogical, untenable, and contrary to regulations and Social Security Rulings"); *Lindner v. Sullivan*, 799 F.Supp. 888, 892 (N.D.Ill. 1992) (multiple rounds of judicial and administrative appeals; Secretary did not contend that his conduct in opposing plaintiff's claim was substantially justified); *Misciagno v. Sec'y of HHS*, 786 F.Supp. 1120, 1122 (E.D.N.Y. 1992) (after two district court remands, and three successive unfavorable decisions by the same ALJ, district court ordered payment of benefits); *Butts v. Bowen*, 775 F.Supp. 1167, 1168 (N.D.Ill. 1991) (ten years of litigation and administrative hearings required before Secretary agreed that plaintiff had been disabled since 1980; "clear legal errors" of the ALJ rendered Secretary's position without substantial justification); *Sullivan v. Sullivan*, 738 F.Supp. 332, 333 (W.D.Mo. 1990) (two district court remands and administrative decisions required because Secretary "repeatedly ignore[d]" applicable circuit precedent governing evaluation of claim); *Hawkins v. Heckler*, 608 F.Supp. 1201, 1204-05 (D.Kan. 1985) (action of Appeals Council in disregarding remand order was "contemptuous" and an "outrageous example of the abuse of governmental authority").

In addition, although it is not fully spelled out in his opening brief, the Secretary's agenda for eliminating his exposure for claimants' post-remand attorney's fees presumably includes an argument that, after *Finkelstein*, a claimant who desires judicial review of an unfavorable administrative decision following a fourth sentence remand must file a new *complaint* with the district court. *See* Pet Br. at 13-14. Although the Court in *Finkelstein* indicated only that such a decision would be reviewable by "a separate piece of litigation," 496 U.S. at 625, one court has read that language to require the filing of an entirely new complaint. *Frizzell v. Sullivan*, 937 F.2d 254, 256-57 (5th Cir. 1991).

Since *Finkelstein* did not decide that a fourth sentence remand order was a final and appealable decision as to the *claimant*, 496 U.S. at 623 n.3, the "new piece of litigation" needed to obtain review over the administrative decision on remand is not necessarily a new complaint. As *Hudson* explained, the unusual relationship between the courts and the agency engendered by the review provisions of § 405(g) permits the courts to retain jurisdiction over remanded cases in order to "ensure compliance with the district court's order in the administrative proceedings themselves and to prepare for any further proceedings before the district court . . . " *Hudson*, 490 U.S. at 889.[20] The Secretary expressly agreed with this

[20] District court intervention *prior* to a final administrative decision on remand is not infrequently required simply to enforce compliance with its order. *See, e.g., Carrillo v. Bowen*, 636 F.Supp. 97, 99 (D.Ariz. 1986) (order directing Appeals Council to either affirm or reverse the ALJ's decision); *Pierce v. Heckler*, 620 F.Supp. 320, 323 (D.Ariz. 1985) (order directing Appeals Council to terminate "[t]he constant remanding and re-remanding" of the ALJ's favorable decision); *compare Key v. Sullivan*, 925 F.2d

proposition, *id.* at 887, and he generally has acquiesced in the process by which claimants frequently have returned, sometimes more than once, to the district court (through the procedural mechanisms of motions to reopen, or renewed motions for summary judgment, or motions for leave to file a supplemental complaint), in order to obtain review of the Secretary's decision on remand.[21]

The Secretary cannot seriously dispute that the filing of a new complaint in all such actions will entail a significant amount of wasted paperwork, require the consolidation of files and duplication of administrative transcripts, and give rise to various motions for judicial reassignment in order to prevent a second judge from needlessly attempting to discern the intent of his or her colleague's original remand order. However, this remarkably inefficient procedure will enable the Secretary to argue that, should he eventually lose after the second (or third) time around in district court, the claimant cannot claim EAJA fees for *any* time incurred either in the prior civil actions

1056, 1061, 1063 (7th Cir. 1991) ("after so many years of hearings, rehearings, and appeals," the claimant "should receive, and receive immediately, the benefits to which she long has been entitled," particularly where "[t]he Secretary clearly exceeded the scope of the remand order").

[21] In *Wilson v. Heckler*, 609 F.Supp. 120, 124 (W.D.Mo. 1985), the Secretary successfully persuaded the district court that plaintiff's filing of a new complaint to challenge the adverse administrative decision on remand was needlessly "duplicative," and the court determined that, although a remanded Social Security case may be "administratively closed," it will be "reopened" upon request of either party, and "[n]either a new file number, nor a new judge, is assigned." *See also* the various procedural histories recounted in the cases cited *supra* n.19.

or in the intervening administrative proceedings.[22] Such a position utterly defeats the intent of the EAJA to encourage counsel to continue their representation of plaintiffs through the interminable processes often necessary to finally establish entitlement to benefits. *Hudson*, 490 U.S. at 889-90.

Finally, and most troubling, is that the nullification of *Hudson* will cause the greatest injury to those claimants most in need of the relief which Congress extended through the EAJA. Thousands of claims for disability benefits annually arise under Title XVI of the Social Security Act, 42 U.S.C. § 1381 et seq. (the Supplemental Security Income program), which was established to "provide[] a subsistence allowance, under federal standards, to the nation's needy aged, blind, and disabled." *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981). Unlike the disability insurance program established under Title II of the Act, 42 U.S.C. § 401 *et seq.*, the SSI program is a "welfare program" whose beneficiaries are, by definition, in "extreme financial need." *Bowen v. Galbreath*, 485 U.S. 74, 75, 77 (1988).

Little incentive exists for counsel to represent claimants seeking SSI benefits. First, in contrast to the sizeable monthly payments often awarded under Title II, the maximum monthly SSI benefit is meager, thus reducing the

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[22] Presumably, the Secretary is not unaware that EAJA fee awards in such cases are necessarily substantial. *See, e.g., Defrancesca*, 803 F.Supp. at 1338 ($26,421 awarded); *Butts*, 775 F.Supp. at 1173 ($13,836 awarded); *compare Commissioner, INS v. Jean*, 496 U.S. 154, 161 n.9 (1990) (average EAJA award in 1989 was $4,482).

amount of any potential retroactive award.[23] Second, any eventual SSI award is retroactive only to the date of application; under Title II, the award may include the twelve month period prior to application.[24] Third, in contrast to Title II cases, counsel cannot obtain prompt and full payment on a contingency contract with an SSI claimant through the Secretary's withholding of a portion of the retroactive award, since the withholding provisions of 42 U.S.C. § 406(b)(1) are inapplicable to SSI cases. *Bowen v. Galbreath*, 485 U.S. at 79. Fourth, and most important, is the fact that SSI disability claims often are inherently more difficult to win on the merits. Desperately poor persons cannot afford health care, and typically there exists scant medical documentation needed to prove the claim. The cost to counsel of obtaining expert examinations often is not worth the risk of non-reimbursement.

For all of these reasons, the prospect of compensation under the EAJA provides the *only* inducement for representation of SSI claimants, and certainly is a primary incentive for the undertaking of Title II cases as well. *See Sansano v. Sullivan*, 788 F.Supp. 218, 219 (D.N.J. 1992) ("Without the prospect of an award of attorney's fees, it is unlikely that the wrongful denial of Social Security benefits would ever be vindicated."). Therefore, this Court must not accept the Secretary's invitation to "snatch away a lifeline it [has] previously dangled within the Social Security claimant's grasp," and to "pierce the heart of the intent of the EAJA." *Sansano*, 788 F.Supp. at 224. Even if

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[23] Currently the federal SSI monthly benefit rate for a single person is $434. 57 Fed.Reg. 48619 (Oct. 27, 1992).

[24] *Compare* 20 C.F.R. § 404.621(a)(1)(ii) *with* 20 C.F.R. § 416.335.

the Secretary's interpretation of the appropriate filing period in a fourth sentence remand is correct, no reason exists to deny compensation for time incurred in the post-remand administrative proceedings.[25] The Court should explicitly reject the Secretary's request to render *Hudson* meaningless by limiting its holding to sixth sentence remands, and confirm that respondent's EAJA application was timely filed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[25] Since under the Secretary's theory the district court must hold in abeyance the claimant's EAJA application until after the administrative proceedings are concluded, Pet. Br. at 26-27, the district court certainly could permit amendment of the application to include a claim for time incurred subsequent to the remand. *Myers v. Sullivan*, 916 F.2d 659, 679 n. 20 (11th Cir. 1990).

I. COURT OF APPEALS DECISIONS REJECTING THE SECRETARY'S *MELKONYAN*-RELATED EFFORT TO BAR, AS UNTIMELY, A PLAINTIFF'S POST-REMAND APPLICATION FOR ATTORNEY'S FEES UNDER THE EAJA

Gray v. Sullivan, ___F.2d___, No. 91-55380 (9th Cir. Jan. 15, 1993);
Carter v. Sullivan, 976 F.2d 1197 (8th Cir. 1992);
Labrie v. Secretary of HHS, 976 F.2d 779 (1st Cir. 1992);
Scanlon v. Sullivan, 974 F.2d 107 (9th Cir. 1992);
Young v. Sullivan, 972 F.2d 830 (7th Cir. 1992);
Hafner v. Sullivan, 972 F.2d 249 (8th Cir. 1992);
Baker on behalf of Baker v. Sullivan, 956 F.2d 234 (11th Cir. 1992);
Gutierrez v. Sullivan, 953 F.2d 579 (10th Cir. 1992), *cert. pending*, No. 92-361;
Richard v. Sullivan, 955 F.2d 354 (5th Cir. 1992);
Cummings v. Sullivan, 955 F.2d (7th Cir. 1991);
Luna v. U.S. Dept. of HHS, 948 F.2d 169 (5th Cir. 1991);
Damato v. Sullivan, 945 F.2d 982 (7th Cir. 1991);
Sargent v. Sullivan, No. 90-1521 (4th Cir. Aug. 22, 1991) (unpublished).

II. DISTRICT COURT DECISIONS REJECTING THE SECRETARY'S *MELKONYAN*-RELATED ARGUMENTS RAISED IN CONNECTION WITH PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES UNDER THE EAJA

1. Cases holding that the court retains jurisdiction to entertain EAJA application filed subsequent to conclusion of post-fourth sentence remand administrative proceedings

Ryder v. Sullivan, 804 F.Supp. 1365 (D.Colo. 1992)
Bodner v. Sullivan, 804 F.Supp. 23 (N.D.Cal. 1992)
Baker v. Sec'y of HHS, 799 F.Supp. 232 (D.N.H. 1992)
Lenz v. Sec'y of HHS, 798 F.Supp. 69 (D.N.H. 1992)
Rodriguez v. Sec'y of HHS, 794 F.Supp. 58 (D.Puerto Rico 1992)
Mendez v. Sullivan, 792 F.Supp. 375 (E.D.Pa. 1992)
Kling v. Sec'y of HHS, 790 F.Supp. 145 (N.D.Ohio 1992)
Van Tassell v. Sullivan, 789 F.Supp. 1108 (D.Colo. 1992)
Winn v. Sullivan, 787 F.Supp. 172 (E.D.Mo. 1992)
Sparling v. Sullivan, 785 F.Supp. 312 (N.D.N.Y. 1992)
Heredia v. Sullivan, 783 F.Supp. 1550 (D.Puerto Rico 1992)
Carter v. Sullivan, 782 F.Supp. 1251 (N.D.Ill. 1991)
Muniz v. Sullivan, 780 F.Supp. 743 (D.Colo. 1992)
Linkins v. Sullivan, 779 F.Supp. 1324 (M.D.Fla. 1991)
Thomas v. Sullivan, 778 F.Supp. 473 (W.D.Mo. 1992)
Merryman v. Sullivan, 778 F.Supp. 475 (W.D.Mo. 1991)
Lineberry v. Sullivan, 778 F.Supp. 1087 (W.D.Mo. 1992)
Parsons v. Sullivan, 140 F.R.D. 352 (S.D.Ohio 1992)

2. Cases in which courts declined to apply *Melkonyan's* fourth sentence remand timeliness discussion retroactively

Defrancesco v. Sullivan, 803 F.Supp. 1332 (N.D.Ill. 1992)
Carrol v. Sullivan, 802 F.Supp. 295 (C.D.Cal. 1992)
Lindner v. Sullivan, 799 F.Supp. 888 (N.D.Ill. 1992)
Sansano v. Sullivan, 788 F.Supp. 218 (D.N.J. 1992)
Green v. Sullivan, 788 F.Supp. 275 (W.D.Va. 1992)
Bacon v. Sec'y of HHS, 786 F.Supp. 434 (D.N.J. 1992)
Thomas for Brown v. Sullivan, 785 F.Supp. 788 (C.D.Ill. 1992)
Rollins v. Sullivan, 784 F.Supp. 253 (E.D.Pa. 1992)
Santiago v. Sullivan, 783 F.Supp. 223 (E.D.Pa. 1992)
Lopez v. Sullivan, 780 F.Supp. 496 (N.D.Ill. 1991)
Sykes v. Sullivan, 779 F.Supp. 29 (E.D.Pa. 1991)
Butts v. Bowen, 775 F.Supp. 1167 (N.D.Ill. 1991), *reaff'd*, 778 F.Supp. 453 (N.D.Ill. 1991)

3. Cases in which courts construed the remand at issue as a "sentence six" remand

Rivera-Sanchez v. Sec'y of HHS, 786 F.Supp. 147 (D.Puerto Rico 1992)
Robinson v. Sullivan, 783 F.Supp. 245 (E.D.N.C. 1991)
Kolman v. Sullivan, 782 F.Supp. 423 (E.D.Wis. 1992)
Burr v. Sullivan, 782 F.Supp. 1285 (N.D.Ill. 1992)
Hudson v. Sullivan, 779 F.Supp. 37 (W.D.Pa. 1991)
Johnson v. Sullivan, 779 F.Supp. 1277 (D.S.C. 1991)
Thomas v. Sullivan, 778 F.Supp. 473 (W.D.Mo. 1992)
Woods v. Sullivan, 778 F.Supp. 976 (N.D.Ill. 1991)

4. Cases in which courts have held that the claimant qualifies as a "prevailing party" simply by virtue of obtaining a "fourth sentence" remand order

Gagnon v. Sullivan, 792 F.Supp. 873 (D.Me. 1992)
Spurlock v. Sullivan, 783 F.Supp. 474 (N.D.Cal. 1992), *reaff'd*, 790 F.Supp. 979 (N.D.Cal. 1992)
Mills v. Sullivan, 782 F.Supp. 1347 (W.D.Mo. 1992)
Sesker v. Sullivan, 779 F.Supp. 1042 (W.D.Mo. 1991)
Dow v. Sullivan, 774 F.Supp. 46 (D.Me. 1991)

5. Cases in which courts retained jurisdiction following a remand order which was characterized as neither "fourth" nor "sixth" sentence in character

Petrie v. Sullivan, 800 F.Supp. 632 (N.D.Ill. 1992)
Ground v. Sullivan, 785 F.Supp. 557 (S.D.Cal. 1992)

6. Cases in which courts have equitably tolled the EAJA statute of limitations

Boronat v. Sullivan, 788 F.Supp. 557 (S.D.Fla. 1992)
Goldbach v. Sullivan, 779 F.Supp. 9 (N.D.N.Y. 1991)

7. Cases in which courts have reopened the judgment under Fed.R.Civ.P. 60(b)

Misciagno v. Sec'y of HHS, 786 F.Supp. 1120 (E.D.N.Y. 1992)

III. DISTRICT COURT DECISIONS ADOPTING THE SECRETARY'S *MELKONYAN*-RELATED ARGUMENTS TO BAR AN APPLICATION FOR ATTORNEY'S FEES UNDER THE EAJA AS UNTIMELY

Pettyjohn v. Sullivan, 801 F.Supp. 503 (W.D.Okla. 1992)
Salvador v. Sullivan, 786 F.Supp. 830 (N.D.Cal. 1992)
Audette v. Sec'y of HHS, 776 F.Supp. 84 (D.R.I. 1991)
Fergason v. Sullivan, 771 F.Supp. 1008 (W.D.Mo. 1991)